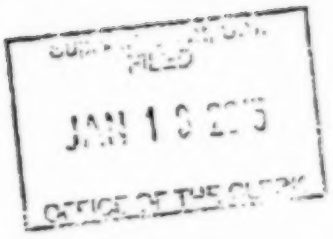
14-857



No. ____

In the Supreme Court of the United States

CAMPBELL-EWALD COMPANY,
Petitioner,

v.

JOSE GOMEZ,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

LAURA A. WYTSMA
CHRISTINE M. REILLY
MEREDITH J. SILLER
LOEB & LOEB LLP
10100 Santa Monica Blvd.
Suite 2200
Los Angeles, CA 90067
(310) 282-2000

GREGORY G. GARRE
Counsel of Record
NICOLE RIES FOX
KATYA S. CRONIN
LATHAM & WATKINS LLP
555 11th Street, NW
Suite 1000
Washington, DC 20004
(202) 637-2207
gregory.garre@lw.com

Counsel for Petitioner

QUESTIONS PRESENTED

1. Whether a case becomes moot, and thus beyond the judicial power of Article III, when the plaintiff receives an offer of complete relief on his claim.

2. Whether the answer to the first question is any different when the plaintiff has asserted a class claim under Federal Rule of Civil Procedure 23, but receives an offer of complete relief before any class is certified.

3. Whether the doctrine of derivative sovereign immunity recognized in *Yearsley v. W.A. Ross Construction Co.*, 309 U.S. 18 (1940), for government contractors is restricted to claims arising out of property damage caused by public works projects.

RULE 29.6 STATEMENT

Petitioner Campbell-Ewald Company is a wholly-owned subsidiary of The Interpublic Group of Companies, Inc. No other person or publicly held corporation owns 10% or more of the stock of Campbell-Ewald Company.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

RULE 29.6 STATEMENT ii

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULE INVOLVED 1

INTRODUCTION 1

STATEMENT OF THE CASE 3

A. Plaintiff's Lawsuit 3

B. Campbell-Ewald's Unaccepted Offers Of Full Relief And District Court Proceedings 5

C. Campbell-Ewald's Motion To Dismiss Plaintiff's Appeal For Lack Of Jurisdiction 7

D. The Ninth Circuit's Decision 11

REASONS FOR GRANTING THE WRIT 12

I. CERTIORARI IS WARRANTED ON THE JURISDICTIONAL QUESTIONS 13

A. As This Court Has Recognized, The Circuits Are Split On Whether An Offer Of Full Relief Moots A Plaintiff's Individual Claim 13

TABLE OF CONTENTS—Continued

Page

B. The Ninth Circuit's Holding That The Class Claim Is Not Moot Conflicts With *Genesis Healthcare* And Decisions Of Other Courts 18

II. CERTIORARI IS WARRANTED ON THE DERIVATIVE IMMUNITY QUESTION 23

III. THIS COURT'S REVIEW IS NEEDED 27

CONCLUSION 30

APPENDIX

Opinion of the United States Court of Appeals for the Ninth Circuit, *Gomez v. Campbell-Ewald Co.*, 768 F.3d 871 (9th Cir. 2014) 1a

Order of the United States District Court for the Central District of California Regarding Defendant's Motion for Summary Judgment and Motion for Summary Judgment on the Pleadings, *Gomez v. Campbell-Ewald Co.*, No. CV 10-02007 DMG (CWx), 2013 WL 655237 (C.D. Cal. Feb. 22, 2013) 22a

Order of the United States District Court for the Central District of California Regarding (1) Plaintiff's Motion To Strike [Doc. # 32]; (2) Plaintiff's Motion For Class Certification [Doc. # 33]; and (3) Defendant's Motion To Dismiss [Doc. # 47], *Gomez v. Campbell-Ewald Co.*, 805 F. Supp. 2d 923 (C.D. Cal. Apr. 8, 2011) 35a

TABLE OF CONTENTS—Continued

Page

Offer of Judgment Pursuant to Federal Rule of Civil Procedure 68, *Gomez v. Campbell-Ewald Co.*, No. CV 10-2007 DMG (CWx) (C.D. Cal. Jan. 5, 2011), ECF No. 31 (with Exhibit 1) 52a

Settlement Offer, *Gomez v. Campbell-Ewald Co.*, No. CV 10-2007 DMG (CWx), dated Jan. 5, 2011 (C.D. Cal. Mar. 11, 2011), ECF No. 45-8 (with enclosure) 57a

Order of the United States Court of Appeals for the Ninth Circuit for Stay of the Issuance of the Mandate, *Gomez v. Campbell-Ewald Co.*, No. 13-55486 (9th Cir. Oct. 24, 2014) 62a

United States Constitution art. III, § 2 ..... 64a

47 U.S.C. § 227(b)(1), (3) 65a

Federal Rule of Civil Procedure 68(a) 68a

TABLE OF AUTHORITIES

Page(s)

CASES

Anderson v. CNH U.S. Pension Plan,
515 F.3d 823 (8th Cir. 2008) 22

Boyle v. United Technologies Corp.,
487 U.S. 500 (1988) 25

Burgess v. Colorado Serum Co.,
772 F.2d 844 (11th Cir. 1985) 26

Butters v. Vance International,
225 F.3d 462 (4th Cir. 2000) 26

Cabala v. Crowley,
736 F.3d 226 (2d Cir. 2013) 16

DaimlerChrsyler Corp. v. Cuno,
547 U.S. 332 (2006) 13, 29

Damasco v. Clearwire Corp.,
662 F.3d 891 (7th Cir. 2011) 15, 22, 28

Deposit Guaranty National Bank v. Roper,
445 U.S. 326 (1980) 20

Diaz v. First American Home Buyers Protection Corp.,
732 F.3d 948 (9th Cir. 2013) 9, 10, 11, 16

Filarsky v. Delia,
132 S. Ct. 1657 (2012) 25

TABLE OF AUTHORITIES—Continued

Page(s)

Genesis Healthcare Corp. v. Symczyk,
133 S. Ct. 1523 (2013) ..... *passim*

Greisz v. Household Bank (Ill.), N.A.,
176 F.3d 1012 (7th Cir. 1999) 14

Koutsoubos v. Boeing Vertol,
755 F.2d 352 (3d Cir. 1985) 26

Krim v. pcOrder.com, Inc.,
402 F.3d 489 (5th Cir. 2005) 14

Lucero v. Bureau of Collection Recovery, Inc.,
639 F.3d 1239 (10th Cir. 2011) 22

Mabary v. Home Town Bank, N.A.,
771 F.3d 820 (5th Cir. 2014) 23

McCauley v. Trans Union, L.L.C.,
402 F.3d 340 (2d Cir. 2005) 16

O'Brien v. Ed Donnelly Enterprises, Inc.,
575 F.3d 567 (6th Cir. 2009) 14, 17

Pitts v. Terrible Herbst, Inc.,
653 F.3d 1081 (9th Cir. 2011) 9, 19

Rand v. Monsanto Co.,
926 F.2d 596 (7th Cir. 1991) 10, 15, 17

Rhodes v. E.I. du Pont de Nemours & Co.,
636 F.3d 88 (4th Cir. 2011) 22

TABLE OF AUTHORITIES—Continued

Page(s)

Sandoz v. Cingular Wireless LLC,
553 F.3d 913 (5th Cir. 2008) 15, 21

Sosna v. Iowa,
419 U.S. 393 (1975) 20

Stein v. Buccaneers Limited Partnership,
772 F.3d 698 (11th Cir. 2014) 16, 22, 23, 28

Tillett v. J.I. Case Co.,
756 F.2d 591 (7th Cir. 1985) 26

Tozer v. LTV Corp.,
792 F.2d 403 (4th Cir. 1986) 26

United States Parole Commission v. Geraghty,
445 U.S. 388 (1980) 8, 20

Warren v. Sessions & Rogers, P.A.,
676 F.3d 365 (4th Cir. 2012) 14

Weiss v. Regal Collections,
385 F.3d 337 (3d Cir. 2004) 14, 15, 21

Yearsley v. W.A. Ross Construction Co.,
309 U.S. 18 (1940) 3, 24

CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULE

United States Constitution art. III, § 2 1

28 U.S.C. § 1254(1) 1

TABLE OF AUTHORITIES—Continued

Page(s)

47 U.S.C. § 227 1

47 U.S.C. § 227(b)(3) 5

Federal Rule of Civil Procedure 68(a) 1

OTHER AUTHORITIES

Paul F. Corcoran *et al.*, *The Telephone Consumer Protection Act: Privacy Legislation Gone Awry?*, 10 Intell. Prop. & Tech. L.J. 9 (2014) 27

Monica Desai *et al.*, *A TCPA for the 21st Century: Why TCPA Lawsuits Are on the Rise and What the FCC Should Do About It*, 1 Int'l J. Mobile Mktg., 75 (2013) 27

Allison Grande, *TCPA Class Action Surge Shows No Signs Of Abating* (May 24, 2013), *available at* http://www.law360.com/articles/444874/tcpa-class-action-surge-shows-no-signs-of-abating 27

1 Joseph M. McLaughlin, *McLaughlin on Class Actions: Law and Practice* § 4:28 (9th ed. 2012) 15

1 William B. Rubenstein *et al.*, *Newberg on Class Actions* § 2:15 (5th ed. 2013) 15

TABLE OF AUTHORITIES—Continued

Page(s)

U.S. Chamber Institute for Legal Reform, *The Juggernaut of TCPA Litigation: The Problems with Uncapped Statutory Damages* (Oct. 2013) 28

13B Charles Alan Wright *et al.*, *Federal Practice and Procedure* § 3533.2 (3d ed. 2008) 15

PETITION FOR A WRIT OF CERTIORARI

Petitioner Campbell-Ewald Company (Campbell-Ewald) respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-21a) is reported at 768 F.3d 871. The order of the district court denying Campbell-Ewald's motion to dismiss (*id.* at 35a-51a) is reported at 805 F. Supp. 2d 923. The order of the district court granting summary judgment in favor of Campbell-Ewald (*id.* at 22a-34a) is unreported, but available at 2013 WL 655237.

JURISDICTION

The court of appeals entered judgment on September 19, 2014. App. 1a-2a. On October 24, 2014, the court of appeals granted Campbell-Ewald's motion to stay the mandate pending this Court's review. *Id.* at 62a-63a. On December 8, 2014, Justice Kennedy granted a timely application to extend the time within which to petition for certiorari to January 19, 2015. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULE INVOLVED

Article III, Section 2 of the U.S. Constitution, pertinent provisions of the Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227, and Federal Rule of Civil Procedure 68(a) are set forth in the Appendix hereto at 64a-68a.

INTRODUCTION

This case presents the jurisdictional question that this Court granted certiorari to decide in *Genesis*

Healthcare Corp. v. Symczyk, 133 S. Ct. 1523 (2013)—whether a case becomes moot, and thus beyond the judicial power of Article III, when the plaintiff receives an offer of complete relief on his claims. In *Genesis Healthcare*, the Court was unable to decide whether an offer of complete relief moots a plaintiff's individual claim because it concluded that the issue was not properly presented in that case. *Id.* at 1528-29. The acknowledged circuit conflict on that issue persists. This case presents an ideal vehicle for this Court to decide that issue, along with the equally important question whether an offer of complete relief before class certification moots a named plaintiff's class claim under Federal Rule of Civil Procedure 23.

This case underscores the need for the Court's resolution of these issues. It involves a class action brought under the Telephone Consumer Protection Act (TCPA) against a national marketing firm (petitioner Campbell-Ewald) over a text message that Campbell-Ewald sent on behalf of the U.S. Navy to recruit new sailors. The TCPA provides for small statutory damages—$500 per violation—for unauthorized messages. But the Act has become an extortionist weapon in the hands of class action attorneys seeking to extract lucrative attorneys' fees for class-wide settlements. In response, many defendants, including Campbell-Ewald here, have offered plaintiffs complete relief on their individual claims at the outset—before any class is certified—agreeing to make plaintiffs whole for any TCPA violations, while sparing all the costs of protracted litigation. In the decision below, the Ninth Circuit held that an offer of complete relief fails to moot either the plaintiff's individual claim or his class claim. That decision contravenes basic Article III

principles, directly conflicts with the decisions of other circuits, and warrants this Court's review.

The Ninth Circuit's decision in this case also raises an additional question that merits this Court's review. After concluding that this case was not moot despite Campbell-Ewald's offer of complete relief, the Ninth Circuit reversed the district court's holding that, under *Yearsley v. W.A. Ross Construction Co.*, 309 U.S. 18 (1940), Campbell-Ewald was entitled to derivative sovereign immunity from liability for recruiting activities carried out under a valid contract with the Navy. The Ninth Circuit's immunity ruling rests on the remarkable and unsupported proposition that *Yearsley* applies "only in the context of property damage resulting from public works projects." App. 16a. That ruling not only is at odds with *Yearsley* and the decisions of other courts of appeals, but also seriously erodes a bedrock protection for those who carry out valid government contracts for the public good. The Ninth Circuit's categorical and illogical limit on the scope of the derivative sovereign immunity doctrine independently warrants this Court's review.

STATEMENT OF THE CASE

A. Plaintiff's Lawsuit

Recruiting is one of the armed services' most important missions. In undertaking this critical mission, the U.S. Navy contracts with outside advertising agencies, including (for the last dozen years) Campbell-Ewald. C.A.E.R. 2, 503, 520.[1] In 2006, as part of an ongoing contract, the Navy directed

---

[1] C.A.E.R. refers to the court of appeals excerpts of record. C.A.S.E.R refers to the supplemental excerpts.

Campbell-Ewald to develop a mobile marketing campaign using emerging forms of technology. *See id.* at 557-67, 671-72 678-803. The contract expressly provided for oversight of Campbell-Ewald's work and required the Navy to approve all deliverables provided by Campbell-Ewald. *Id.* at 696, 699-704, 718-19. During the course of the contract, the Navy was "in constant contact with Campbell-Ewald on a daily basis" for input or approval. C.A.S.E.R. 83.

In 2005, the Navy authorized funds for Campbell-Ewald to explore new media opportunities, including text messaging. C.A.E.R. 400-02, 766. Campbell-Ewald submitted a proposed media plan that included an option for mobile marketing to expand the Navy's efforts via text messaging. *Id.* at 625, 759-64. The Navy "liked the idea of contacting people via text message" and approved the plan. C.A.S.E.R. 72. To execute this plan, Campbell-Ewald contracted with a separate entity, MindMatics LLC, to deliver the "'Navy branded SMS (text) direct mobile "push" program to the cell phones of 150,000 Adults 18–24 from an opt-in list of over 3 million.'" App. 25a (citation omitted); *see* C.A.E.R. 406-16. MindMatics was responsible for the actual execution of the text messaging campaign. C.A.E.R. 531-50.

Together, Campbell-Ewald and the Navy developed the text message that is the subject of this lawsuit. *Id.* at 523, 601; C.A.S.E.R. 54. The message read:

> Destined for something big? Do it in the Navy. Get a career. An education. And a chance to serve a greater cause. For a FREE Navy video call [number].

App. 2a. The copy of the message was revised and approved by the Navy. *Id.* MindMatics "handled the

deployment, transmission and delivery of the text messages." *Id.* at 26a. Campbell-Ewald had no involvement in transmitting the messages. C.A.E.R. 523-24.

Plaintiff claims to have received this text message in May 2006, along with approximately 100,000 other individuals. He claims that he did not consent to receive the message. App. 3a, 36a. Three years and ten months after receiving the message, Plaintiff filed an action under the TCPA, naming Campbell-Ewald—but not the Navy or Mindmatics—as the defendant. *Id.* at 2a-3a. In addition to bringing an individual claim against Campbell-Ewald, Plaintiff sought to represent a putative nationwide class of "other unconsenting recipients of the Navy's recruiting messages," pursuant to Federal Rule of Civil Procedure 23. *Id.* at 3a. Plaintiff sought damages for the alleged TCPA violation on an individual and class-wide basis, seeking hundreds of millions of dollars on behalf of the class. App. 2a, 22a; *see also* C.A.E.R. 57-63 (complaint).[2]

B. Campbell-Ewald's Unaccepted Offers Of Full Relief And District Court Proceedings

Before any class was certified and before Plaintiff had even moved for certification, Campbell-Ewald attempted to resolve the case by offering Plaintiff complete relief on his claim. App. 52a-61a. Campbell-Ewald tendered an offer of judgment pursuant to Federal Rule of Civil Procedure 68 (*id.* at 52a-56a) as well as a separate settlement offer (*id.* at 57a-61a) that

---

[2] The TCPA provides statutory damages of $500 per violation, which can be trebled for willful and knowing violations. 47 U.S.C. § 227(b)(3).

would have fully satisfied Plaintiff's claim. In each, Campbell-Ewald offered to (1) pay Plaintiff $1503 for each unsolicited text message that Plaintiff allegedly received from or on behalf of Campbell-Ewald (over three times the statutory amount of $500 per violation set by Congress); (2) pay all reasonable costs that Plaintiff would recover if he were to prevail; and (3) stipulate to an injunction prohibiting it from the alleged wrongs. *Id.* at 38a-39a; 52a-61a.

Plaintiff did not accept these offers. *Id.* at 3a. Instead, he filed a motion to strike the Rule 68 offer and a motion for class certification pursuant to the deadline to which the parties stipulated. *Id.* at 39a. Campbell-Ewald moved to dismiss the action for lack of jurisdiction, arguing that its offers of complete relief mooted both Plaintiff's individual and class claims under basic Article III principles. *Id.* at 39a-40a.

The district court denied Campbell-Ewald's motion. *Id.* at 35a. The court acknowledged that Campbell-Ewald's offers "would have fully satisfied the individual claims asserted ... by Plaintiff in this action." *Id.* at 40a. But the court held that the offers mooted neither Plaintiff's individual claim nor his class claim. As to the class claim, the court held that Plaintiff's class certification motion (filed after Campbell-Ewald made its offers of full relief) could relate back to the filing of the class complaint (before Campbell-Ewald had made its offers). *Id.* at 49a-50a. The court then granted Plaintiff's motion to strike the Rule 68 offer, reasoning that "because Plaintiff did not accept Defendant's offer of judgment, Defendant was not entitled under Rule 68 to file the offer of judgment." *Id.* at 49a. The court held that Campbell-Ewald's separate settlement offer—which remained

(and remains) open by its terms—did not moot Plaintiff's claim for the same reasons. *Id.*

After a period of discovery, Campbell-Ewald moved for summary judgment, arguing, *inter alia*, that it was entitled to derivative sovereign immunity. Campbell-Ewald explained that, under this Court's decision in *Yearsley*, it could not be held liable for an alleged TCPA violation for which the Navy itself could not held liable, given that Campbell-Ewald was simply carrying out validly conferred authority under a contract with the Navy. *Id.* at 30a. The district court granted Campbell-Ewald's motion, holding that it is entitled to derivate sovereign immunity. *Id.* at 33a-34a.

The district court explained that it is undisputed that "the Navy cannot be sued for violation of the TCPA" because the United States has not waived its sovereign immunity from suit under the TCPA. *Id.* at 30a. In addition, the court found that Plaintiff "points to no evidence indicating that [Campbell-Ewald] exceeded the scope of its authority to send the text message at issue." *Id.* at 32a. Indeed, the court explained, the "undisputed" facts show that "[Campbell-Ewald] acted at the Navy's direction to effectuate [the] text message recruitment campaign." *Id.* at 33a. Accordingly, the court concluded that, "[a]cting as a Navy contractor, [Campbell-Ewald] is immune from liability under the doctrine of derivate sovereign immunity." *Id.* at 33a-34a.

Plaintiff appealed.

C. Campbell-Ewald's Motion To Dismiss Plaintiff's Appeal For Lack Of Jurisdiction

A month after Plaintiff appealed, this Court decided *Genesis Healthcare*, which held that an unaccepted

offer of full relief under Rule 68 mooted a collective action under the Fair Labor Standards Act (FLSA). The Court first considered whether the offer mooted plaintiff's individual claim—an issue on which the Court acknowledged the circuits are "split." 133 S. Ct. at 1528 & n.3. But the Court concluded that it could not "reach this question, or resolve the split, because the issue is not properly before us" (due to the "absence of a cross-petition from respondent" on the issue). *Id.* at 1528-29. Accordingly, the Court "assume[d], without deciding, that petitioners' Rule 68 offer mooted [plaintiff]'s individual claim." *Id.* at 1529.

Next, the Court considered whether the "collective-action allegations" in the complaint were justiciable where the lone plaintiff's individual claim had become moot because of the offer of full relief. *Id.* The Court held that, under "straightforward application of well-settled mootness principles," the entire suit became moot when the plaintiff's individual claim became moot "because she lacked any personal interest in representing others in this action." *Id.* The Court rejected the argument that an "'inherently transitory' class-action claim" could render the collective-action claim justiciable under the "relation-back rationale" of *United States Parole Commission v. Geraghty*, 445 U.S. 388 (1980), and related cases. 133 S. Ct. at 1530-32. As the Court explained, the relation-back doctrine is based "on the fleeting nature of the challenged conduct giving rise to the claim, not on the defendant's litigation strategy," and there was nothing "fleeting" about plaintiff's claims. *Id.* at 1531.

Justice Kagan—joined by Justices Ginsburg, Breyer, and Sotomayor—dissented. Justice Kagan explained that she would have reached and resolved

the undecided question and held that an unaccepted offer of full relief "will *never*" moot the plaintiff's individual claim, and therefore can never moot the collective claim either. *Id.* at 1536 (Kagan, J., dissenting). In her view, the Court should "have resolved this case (along with a circuit split) by correcting the Third Circuit's view that an unaccepted offer mooted [plaintiff's] individual claim." *Id.* at 1537.

After *Genesis Healthcare*, Campbell-Ewald moved to dismiss Plaintiff's appeal for lack of jurisdiction, arguing that *Genesis Healthcare* makes clear that "the relation-back doctrine does not permit a plaintiff to pursue an action on behalf of others when offered full individual relief before seeking class certification." C-E Mot. 2, ECF No. 8 (9th Cir. June 24, 2013). As Campbell-Ewald explained (*id.* at 14), *Genesis Healthcare* corrected the reasoning of prior Ninth Circuit precedent—such as *Pitts v. Terrible Herbst, Inc.*, 653 F.3d 1081, 1091-92 (9th Cir. 2011)—that invoked the relation-back doctrine in holding that a plaintiff was not barred from pursuing a class claim even though a settlement offer fully satisfied his individual claim. The Ninth Circuit denied Campbell-Ewald's motion without prejudice to Campbell-Ewald renewing the arguments in its answering brief. Order, ECF No. 17 (9th Cir. Aug. 20, 2013).

Two months later, the Ninth Circuit decided *Diaz v. First American Home Buyers Protection Corp.*, 732 F.3d 948 (9th Cir. 2013). In *Diaz*, the Ninth Circuit considered "whether an unaccepted Rule 68 offer that would have fully satisfied a plaintiff's claim is sufficient to render the claim moot." *Id.* at 952. The court acknowledged that "[o]ther circuits are divided on the question" and that the majority view is "that an

unaccepted offer will moot a plaintiff's claim." *Id.* at 952-53 (citing *Rand v. Monsanto Co.*, 926 F.2d 596, 598 (7th Cir. 1991)). But the court rejected the majority view because "four justices of the United States Supreme Court ... embraced a contrary position in *Genesis Healthcare*." *Id.* at 953. The court explained that it was "persuaded that Justice Kagan has articulated the correct approach," quoted at length from Justice Kagan's dissenting opinion in *Genesis Healthcare*, and ultimately held "that an unaccepted Rule 68 offer that would have fully satisfied a plaintiff's claim does not render that claim moot." *Id.* at 954-55.

Several months later, Campbell-Ewald filed its answering brief on appeal, along with a petition for an initial en banc hearing on the jurisdictional issue. In both its brief and en banc petition, Campbell-Ewald explained that the majority in *Genesis Healthcare* rejected the very reasoning employed by *Pitts*. C-E CA9 Br. 3-4, 16; C-E En Banc Pet. 11-12. Campbell-Ewald also explained that *Diaz* had erred in basing its holding on the dissenting opinion in *Genesis Healthcare*, and that *Diaz* conflicted with the majority of the courts of appeals to have addressed the jurisdictional question. C-E En Banc Pet. 7-9. The Ninth Circuit declined to grant Campbell-Ewald's en banc petition. CA9 Docket Entry 40 (denying request).

In response to Campbell-Ewald's motion to dismiss the appeal and answering brief, Plaintiff defended the Ninth Circuit's decision in *Diaz* and asserted various arguments for why the Court should not reach the jurisdictional issue, including (1) that the offer did fully satisfy Plaintiff's claim because it did not include attorney's fees (even though not available under the TCPA), (2) the Rule 68 offer was "stricken from the

record," and (3) Campbell-Ewald had agreed to extend the date for seeking class certification while its motion to dismiss was pending. Pl. CA9 Reply 2-6 & nn.3-4.

D. The Ninth Circuit's Decision

The Ninth Circuit held that the case was not moot despite Campbell-Ewald's offers of complete relief and reversed the district court's ruling that Campbell-Ewald was entitled to derivative sovereign immunity.

On jurisdiction, the Ninth Circuit squarely reached the issue (declining to accept Plaintiff's various procedural objections) and held that neither Plaintiff's individual claim nor the class claim was mooted by Campbell-Ewald's offers of full relief. App. 4a-7a. First, the court held that "'[a]n unaccepted Rule 68 offer that would fully satisfy a plaintiff's claim is insufficient to render the claim moot.'" *Id.* at 5a (quoting *Diaz*, 732 F.3d at 950). Next, the court held that, "the putative class claims are not moot." *Id.* Although the court observed that "*Genesis* undermined some of the reasoning employed in *Pitts* and *Diaz*," the court concluded that *Genesis Healthcare* "is not 'clearly irreconcilable' with *Pitts* or *Diaz*" because the collective claims in *Genesis Healthcare* arose under the FLSA, not Rule 23. *Id.* at 6a-7a (citation omitted).

On immunity, the Ninth Circuit held that this Court's decision in *Yearsley*—on which the district court had relied in finding derivative immunity—is "not applicable" to this dispute. *Id.* at 15a. The court explained that *Yearsley* established only "a narrow rule regarding claims arising out of property damage caused by public works projects." *Id.* In addition, the court declared that "[the Ninth Circuit], in particular, has rarely allowed use of the defense, and only in the

context of property damage resulting from public works projects." *Id.* at 16a. According to the court, there was thus no basis for applying "the [derivative sovereign immunity] doctrine to the present dispute." *Id.* at 16a-17a. The court disposed of Campbell-Ewald's remaining arguments and remanded for further proceedings. *Id.* at 20a.

The Ninth Circuit stayed its mandate pending this Court's review on certiorari. *Id.* at 62a-63a.

REASONS FOR GRANTING THE WRIT

This Court has already concluded that the threshold jurisdictional question presented by this case warrants certiorari. In *Genesis Healthcare*, the Court granted certiorari to decide that same issue—and resolve the acknowledged circuit split underlying it. But the Court was unable to decide whether an offer of complete relief moots a plaintiff's individual claim because it concluded the issue was not properly presented. *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523, 1528-29 (2013). The circuit split over this issue persists, and the resolution of that split is needed even more urgently now. Lower courts have been emboldened by the dissenting opinion in *Genesis Healthcare* to dismiss jurisdictional defects with respect to both individual and class claims when, as here, a defendant makes an offer that would fully satisfy the plaintiff's claim. Certiorari is warranted to resolve the jurisdictional issues presented, as well as the important derivative sovereign immunity question raised by the Ninth Circuit's ruling on the merits.

I. CERTIORARI IS WARRANTED ON THE JURISDICTIONAL QUESTIONS

As this Court has stressed, "'[n]o principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies.'" *DaimlerChrsyler Corp. v. Cuno*, 547 U.S. 332, 341 (2006) (citation omitted). The Ninth Circuit's decision in this case contravenes that limitation by disregarding the "well-settled mootness principles" recognized in *Genesis Healthcare*: (1) a plaintiff "must demonstrate that he possesses a legally cognizable interest, or personal stake in the outcome of the action," (2) "an actual controversy must be extant at all stages of review," and (3) "[i]f an intervening circumstance deprives the plaintiff of a personal stake in the outcome of the lawsuit, at any point during litigation, the action can no longer proceed and must be dismissed as moot." 133 S. Ct. at 1528-29 (citation and internal quotation marks omitted). Ignoring these bedrock principles, the Ninth Circuit permitted Plaintiff's lawsuit to proceed despite the absence of a dispute to litigate or a plaintiff with a personal stake in the outcome of the lawsuit—in direct conflict with the decisions of this Court and those of other circuits.

A. As This Court Has Recognized, The Circuits Are Split On Whether An Offer Of Full Relief Moots A Plaintiff's Individual Claim

This Court recognized in *Genesis Healthcare* that "the Courts of Appeals disagree whether an unaccepted offer that fully satisfies a plaintiff's claim is sufficient to render the claim moot." 133 S. Ct. at 1528.

That conflict—which the Court was unable to resolve in *Genesis Healthcare*—warrants this Court's review.

1. The majority of the courts of appeals—including the Third, Fourth, Fifth, Sixth, and Seventh Circuits—hold that an offer that fully satisfies a plaintiff's claim moots a plaintiff's individual claim. *See, e.g., Weiss v. Regal Collections*, 385 F.3d 337, 340 (3d Cir. 2004); *Warren v. Sessions & Rogers, P.A.*, 676 F.3d 365, 371 (4th Cir. 2012) ("When a Rule 68 offer unequivocally offers a plaintiff all of the relief 'she sought to obtain,' the offer renders the plaintiff's action moot." (citation omitted)); *Krim v. pcOrder.com, Inc.*, 402 F.3d 489, 502 (5th Cir. 2005) (plaintiff's "individual claims were rendered moot" where defendant offered "a settlement equal to the statutory limit on his damages"); *O'Brien v. Ed Donnelly Enters., Inc.*, 575 F.3d 567, 574-75 (6th Cir. 2009) ("[A]n offer of judgment that satisfies a plaintiff's entire demand moots the case . . . .")[3]; *Greisz v. Household Bank (Ill.), N.A.*, 176 F.3d 1012, 1015 (7th Cir. 1999) (offer of complete relief "eliminates a legal dispute upon which federal jurisdiction can be based").

In addition, the Third and Seventh Circuits have held, in circumstances identical to this case, that an offer of complete relief to the plaintiff before it moves for class certification "will generally moot the plaintiff's

---

[3] The Sixth Circuit has further held that, although an offer that fully satisfies a plaintiff's claim moots the plaintiff's claim, a plaintiff should not "lose[] outright when he refuses an offer of judgment that would satisfy his entire demand." *O'Brien*, 575 F.3d at 575. Accordingly, the Sixth Circuit advises district courts that the "better approach" is to "enter judgment in favor of the plaintiffs in accordance with the defendants' Rule 68 offer of judgment." *Id.* at 574-75.

[individual] claim, as at that point the plaintiff retains no personal interest in the outcome of the litigation." *Weiss*, 385 F.3d at 340; *see Damasco v. Clearwire Corp.*, 662 F.3d 891, 895 (7th Cir. 2011) ("'Once the defendant offers to satisfy the plaintiff's entire demand, there is no dispute over which to litigate, and a plaintiff who refuses to acknowledge this loses outright because he has no remaining stake.'" (quoting *Rand v. Monsanto Co.*, 926 F.2d 596, 598 (7th Cir. 1991))); *see also Genesis Healthcare*, 656 F.3d at 195 (holding that a plaintiff's individual FLSA claim was mooted by a Rule 68 offer); *Sandoz v. Cingular Wireless LLC*, 553 F.3d 913, 919 (5th Cir. 2008) (same).[4]

2. The Ninth Circuit's decision in this case directly conflicts with these decisions. The court below squarely held that Plaintiff's "individual claim is not moot," notwithstanding Campbell-Ewald's offers of complete relief. App. 4a. The court explained that, in its view, "[a]n unaccepted Rule 68 offer that would

---

[4] Leading commentators have adopted this position too. *See, e.g.*, 13B Charles Alan Wright *et al.*, *Federal Practice and Procedure* § 3533.2 (3d ed. 2008) ("Even when one party wishes to persist to judgment, an offer to accord all of the relief demanded may moot the case."); 1 Joseph M. McLaughlin, *McLaughlin on Class Actions: Law and Practice* § 4:28 (9th ed. 2012) ("Traditional mootness principles provide that an offer of judgment under Federal Rule of Civil Procedure 68 that satisfies a plaintiff's entire demand moots the claim." (footnote omitted)); 1 William B. Rubenstein *et al.*, *Newberg on Class Actions* § 2:15 (5th ed. 2013) ("If the defendant makes a full offer of judgment pursuant to Rule 68, completely satisfying all of the named plaintiff's individual claims, then the named plaintiff's individual case necessarily becomes moot.").

fully satisfy a plaintiff's claim is insufficient to render the claim moot.'" App. 5a (quoting *Diaz*, 732 F.3d at 950). The conflict is square and undeniable. Indeed, in *Diaz*—on which the court explicitly relied below—the Ninth Circuit recognized that its position was at odds with "the majority of courts." 732 F.3d at 950.

The Eleventh Circuit recently sided with the Ninth Circuit in *Stein v. Buccaneers Limited Partnership*, 772 F.3d 698 (11th Cir. 2014), and held that an unaccepted Rule 68 offer of judgment does not moot a plaintiff's individual claim, *id.* at 703. Following Justice Kagan's dissent—and the Ninth Circuit's decision in *Diaz* embracing "the position set out in [that] dissent," *id.*—the Eleventh Circuit reasoned that the Rule 68 offer could not have mooted plaintiff's individual claim where the offer was not accepted. *Id.* at 703-04; *see also id.* at 703 ("At least one circuit has explicitly adopted the position set out in the [*Genesis Healthcare*] dissent." (citing *Diaz*, 732 F.3d at 954-55)).

The Second Circuit has adopted an intermediate approach—though one that, at least in practical effect, aligns more closely with the majority view. Like the Ninth and Eleventh Circuits, the Second Circuit holds that where a plaintiff has not accepted a defendant's offer of full relief, the case is not moot because "the controversy ... is still alive." *McCauley v. Trans Union, L.L.C.*, 402 F.3d 340, 342 (2d Cir. 2005). But unlike the Ninth and Eleventh Circuits, the Second Circuit has held that the "better resolution" of the case in those circumstances is to enter a default judgment against the defendant for the amount offered in the offer of complete relief. *Id.*; *see also Cabala v. Crowley*, 736 F.3d 226, 228-29 & n.2 (2d Cir. 2013) (discussing *McCauley* and recognizing circuit conflict).

As this case illustrates, the Ninth Circuit's position on the effect of an offer of full relief contravenes fundamental mootness principles. Plaintiff sought relief for an alleged violation of the TCPA based on receipt of a single text message. Campbell-Ewald responded by making an offer of judgment and a separate settlement offer that—as the district court found—"would have fully satisfied the individual claims asserted . . . by Plaintiff in this action." App. 40a. At that point, there was no remaining dispute over which to litigate and Plaintiff had no continuing stake in the litigation and nothing more to gain from its continuing pursuit. *See, e.g.*, *Rand*, 926 F.2d at 597-98. Accordingly, the action should have been dismissed as moot. At a minimum, the district court should have entered judgment in accordance with the defendant's offer of judgment. *O'Brien*, 575 F.3d at 575. Instead, the Ninth Circuit permitted the action to proceed.

This Court's intervention is needed to resolve this clear circuit conflict. That was true when the Court granted certiorari in *Genesis Healthcare*. But it is even more true today given the doubt that the dissenting opinion in *Genesis Healthcare* has created over whether the Court's threshold assumption in *Genesis Healthcare*—that the plaintiff's individual claims were moot—was correct. As illustrated by the Ninth Circuit's decisions in this case and *Diaz* and the Eleventh Circuit's decision in *Stein*, courts of appeals have followed Justice Kagan's dissent in *Genesis Healthcare* and essentially dismissed *the Court's* decision in *Genesis Healthcare* on the ground that it was decided on a faulty premise (as Justice Kagan argued). That trend has created more unrest. Courts

of appeals are bound to follow the majority decisions of this Court—not statements in dissenting opinions.

The circuits that have followed Justice Kagan's dissent may believe that the majority in *Genesis Healthcare* simply felt compelled to accept the premise that the offer of complete relief mooted the plaintiff's individual claims because of the way the case was litigated, but did not actually believe that mootness principles supported that result. That view, however, is belied not only by the Article III principles discussed by the majority (133 S. Ct. at 1528-29), but also by the Court's response to Justice Kagan's dissent (*id.* at 1529 n.4). In any event, this Court should grant certiorari and finally resolve this important issue.

B. The Ninth Circuit's Holding That The Class Claim Is Not Moot Conflicts With *Genesis Healthcare* And Decisions Of Other Courts

The Ninth Circuit's holding that Campbell-Ewald's offer of full relief does not moot Plaintiff's class claim presents its own conflict of authority and independently warrants this Court's review.

1. To begin, the Ninth Circuit's decision is at odds with *Genesis Healthcare*, which held that plaintiff's representative action "became moot when her individual claim became moot, because she lacked any personal interest in representing others in this action" at that time. 133 S. Ct. at 1529. The plaintiff argued that she had "a sufficient personal stake in [the] case based on a statutorily created collective-action interest in representing other similarly situated employees" to keep her collective claims alive despite the fact that her individual claims were moot. *Id.* at 1530. This Court disagreed, explaining that the plaintiff's nascent hope of representing others did not "preserve her suit from

mootness." *Id.* The Court explained that "the mere presence of collective-action allegations in the complaint cannot save the suit from mootness once the individual claim is satisfied." *Id.* at 1529. Once her individual claim became moot, the plaintiff had "no personal interest in representing putative, unnamed claimants, nor any other continuing interest that would preserve her suit from mootness." *Id.* at 1532.

Genesis Healthcare rejects the rationale that the Ninth Circuit relied on in *Pitts* in concluding that the class claims were *not* mooted. The key to the Ninth Circuit's position that the mooting of a plaintiff's individual claim does not moot his class claim is the purportedly "inherently transitory" nature of class claims. *Pitts*, 653 F.3d at 1091. According to the Ninth Circuit, "inherently transitory claims" include class claims "'acutely susceptible to mootness' in light of [the defendant's] tactic of '*picking off*' lead plaintiffs with a Rule 68 offer to avoid a class action." *Id.* (alteration in original) (emphasis added) (citation omitted). But *Genesis Healthcare* rejected the argument that the risk that "defendants can strategically use Rule 68 to 'pick off' named plaintiffs before the collective-action process is complete, render[s] collective actions 'inherently transitory' in effect." 133 S. Ct. at 1531. As the Court explained, the Court's relation-back doctrine "has invariably focused on the fleeting nature of the challenged conduct giving rise to the claim, not on the defendants' litigation strategy." *Id.*[5]

---

[5] As *Genesis Healthcare* reiterated, "[t]he 'inherently transitory' rationale was developed to address circumstances in which the challenged conduct was effectively unreviewable," such as where a plaintiff seeks

In the decision below, the Ninth Circuit conceded that *Genesis Healthcare* "undermined some of the reasoning employed in *Pitts* and *Diaz*." App. 6a. But the court reasoned that this precedent survived *Genesis Healthcare* because of differences between Rule 23 class actions and FLSA collective actions. *See* App. 6a-7a. Not so. In a Rule 23 class action, "a putative class acquires an independent legal status once it is certified under Rule 23," whereas "conditional certification [under the FLSA] does not produce a class with an independent legal status." 133 S. Ct. at 1530. But before a district court rules on class certification, a plaintiff bringing representative claims under Rule 23 is in the same position as a plaintiff bringing representative claims under the FLSA. In a Rule 23 class action, no less than in a FLSA collective action, a putative class representative has no "personal stake" in representing unnamed class members that would "preserve [the] suit from mootness." *Id.* Any relevant difference between FLSA collective actions and Rule 23 class actions emerges after, not before, certification.

As in *Genesis Healthcare*, the Court's decisions in *United States Parole Commission v. Geraghty*, 445 U.S. 388 (1980), *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326 (1980), and *Sosna v. Iowa*, 419 U.S. 393 (1975), "are, by their own terms, inapplicable." 133

"to bring a class action challenging the constitutionality of temporary pretrial detentions." 133 S. Ct. at 1530. Because "pretrial custody likely would end prior to the resolution of his claim," the relation-back doctrine is necessary to prevent the defendant's conduct from being "insulate[d] ... from review." *Id.* at 1531. The claim in *Genesis Healthcare*, like the claims here, did not challenge conduct, like a temporary pretrial detention, that is "fleeting." *Id.*

S. Ct. at 1529. *Geraghty* is inapplicable here because no class was certified at the time of the offers of full relief (indeed, Plaintiff had yet to move for certification) and, accordingly, there is "simply no certification decision to which [his] claim could have related back." *Genesis Healthcare*, 133 S. Ct. at 1530. *Sosna*'s "inherently transitory" exception is inapplicable because, as explained, there is nothing "fleeting" about the challenged conduct here that could cause it to evade review. *Id.* at 1531. And *Roper* is inapplicable because "*Roper*'s holding turned on a specific factual finding that the plaintiffs possessed a continuing personal economic stake in the litigation, even after the defendants' offer of judgment." *Id.* That personal stake is missing where, as here, the defendant's Rule 68 or settlement offer "provide[s] complete relief on [the plaintiff's] individual claims." *Id.*

2. The Ninth Circuit's decision also exacerbates a circuit split on whether and how an offer of full relief that moots an individual claim moots class claims under Rule 23 as well. The Third, Fifth, Ninth, Tenth, and Eleventh Circuits have held that the relation-back doctrine may be invoked to keep a class action alive even where the plaintiff's individual claim becomes moot. *See, e.g.*, *Weiss*, 385 F.3d at 348 ("Absent undue delay in filing a motion for class certification, therefore, where a defendant makes a Rule 68 offer to an individual claim that has the effect of mooting possible class relief asserted in the complaint, the appropriate course is to relate the certification motion back to the filing of the class complaint."); *Sandoz*, 553 F.3d at 920 ("The proper course . . . is to hold that when a FLSA plaintiff files a timely motion for certification of a collective action, that motion relates back to the date

the plaintiff filed the initial complaint . . . ."); *Lucero v. Bureau of Collection Recovery, Inc.*, 639 F.3d 1239, 1247-50 (10th Cir. 2011) ("[A] nascent interest attaches to the proposed class upon the filing of a class complaint such that a rejected offer of judgment . . . does not render the case moot under Article III."); *Stein*, 772 F.3d at 704-09 (same).

By contrast, the Fourth, Seventh, and Eighth Circuits have held that the entire class action suit becomes moot along with the named plaintiff's individual claim when, as here, the defendant makes an offer of full relief before class certification. *See, e.g.*, *Rhodes v. E.I. du Pont de Nemours & Co.*, 636 F.3d 88, 100 (4th Cir. 2011) ("[W]hen a putative class plaintiff voluntarily dismisses the individual claims underlying a request for class certification, as happened in this case, there is no longer a 'self-interested party advocating' for class treatment in the manner necessary to satisfy Article III standing requirements."); *Damasco*, 662 F.3d at 896 ("To allow a case, not certified as a class action and with no motion for class certification even pending, to continue in federal court when the sole plaintiff no longer maintains a personal stake defies the limits on federal jurisdiction expressed in Article III."); *Anderson v. CNH U.S. Pension Plan*, 515 F.3d 823, 826-27 (8th Cir. 2008) ("[T]he voluntary settlement reached by the named plaintiffs with both defendants leads us to conclude that the entire case is now moot.").

As discussed above, the principles set forth in *Genesis Healthcare* should apply equally to Rule 23 class actions and should settle the split in favor of the Fourth, Seventh, and Eighth Circuits. But as the Ninth Circuit's decision below demonstrates, until this Court says so in the Rule 23 context, courts will persist

in applying their erroneous view of the relation-back doctrine in contravention of *Genesis Healthcare*. Indeed, the Ninth Circuit is not the only court of appeals to continue to apply its erroneous rule despite *Genesis Healthcare*. Both the Fifth and Eleventh Circuits have done so as well, holding that *Genesis Healthcare* is inapplicable to Rule 23 class actions. *See Mabary v. Home Town Bank, N.A.*, 771 F.3d 820, 824-25 (5th Cir. 2014); *Stein*, 772 F.3d at 708. Nevertheless, in *Stein* the Eleventh Circuit acknowledged that the circuits are split on this issue. 772 F.3d at 708.

Certiorari is warranted to resolve this conflict. *Genesis Healthcare* should have clarified the law in this area. But the fact that the Court could not decide whether an offer of full relief moots an individual claim coupled with Justice Kagan's dissenting opinion have created further conflict and confusion on this issue. So far, the only message that has influenced the lower courts is Justice Kagan's admonition in dissent, "Don't try this at home." 133 S. Ct. at 1534.

II. CERTIORARI IS WARRANTED ON THE DERIVATIVE IMMUNITY QUESTION

The jurisdictional issues should have ended this case. But when it reached the merits, the Ninth Circuit made another ruling that independently warrants this Court's review. The court held that the derivative sovereign immunity doctrine grounded in *Yearsley*, is "not applicable" to this dispute on the ground that *Yearsley* established only "a narrow rule regarding claims arising out of property damage caused by public works projects." App. 15a; *see id.* at 16a ("This Court, in particular, has rarely allowed use of this defense, and only in the context of property damage resulting from public works projects."). That

ruling fundamentally misconstrues and unduly limits the doctrine of derivative sovereign immunity.

1. In *Yearsley*, the Court held that the doctrine of derivative sovereign immunity foreclosed tort claims brought against a private contractor that performed services on behalf of the U.S. government. The contractor was hired by the government to improve navigation on the Missouri river and, in that capacity, built several dikes along the river. 309 U.S. at 19. The plaintiff alleged that dikes had damaged its land. In holding that the contractor was entitled to derivative immunity, the Court explained: "[I]f th[e] authority to carry out the project was validly conferred, that is, if what was done was within the constitutional power of Congress, there is no liability on the part of the contractor for executing its will." *Id.* at 20-21. Because the contractor's work was "authorized and directed by the Government of the United States," the contractor could not be held liable for its actions. *Id.* at 20.

Yearsley established a general rule that government contractors are immune from liability for performing duties within the scope of their lawfully delegated authority. As the Court put it, there is "no ground for holding [the government's] agent liable who is simply acting under the authority thus validly conferred." *Id.* at 21-22. Nothing in the Court's opinion restricts the derivative immunity doctrine to "the context of property damage resulting from public works projects" (App. 16a). And such a limitation would be illogical. The important interests served by the derivative immunity doctrine do not turn on either the type of project being carried out (public works or otherwise), or the type of injury asserted (property damage or otherwise). What matters is whether the

contractor was acting within the scope of validly conferred authority in undertaking the project.

This Court's precedents confirm the Ninth Circuit's misreading of *Yearsley*. For example, in *Boyle v. United Technologies Corp.*, 487 U.S. 500, 506 (1988)—a products liability case not involving a public works project or property damages—the Court favorably recounted its holding in *Yearsley* that "if [the] authority to carry out the project was validly conferred, that is, if what was done was within the constitutional power of Congress, there is no liability on the part of the contractor for executing its will." The Court in no way suggested that the derivative immunity doctrine is limited to the particular facts of *Yearsley*. Indeed, although the decision in *Boyle* was ultimately grounded in principles of pre-emption rather than immunity, the Court unequivocally relied on *Yearsley*'s rationale and specifically noted that it saw "no basis" to limit "the federal interest justifying [the *Yearsley*] holding" only to performance contracts. *Id.*

The Ninth Circuit's restriction of the derivative immunity doctrine is also belied by the Court's discussion of basic immunity principles in *Filarsky v. Delia*, 132 S. Ct. 1657, 1662 (2012). In *Filarsky*, the Court reiterated that "'the most important special government immunity-producing concern'" is "the government interest in avoiding 'unwarranted timidity' on the part of those engaged in the public's business." *Id.* at 1665 (citation omitted). In addition, the Court emphasized that "[e]nsuring that those who serve the government do so 'with the decisiveness and the judgment required by the public good,' is of vital importance regardless whether the individual sued as a state actor works full-time or on some other basis." *Id.*

So too, ensuring such decisiveness is of "vital importance" regardless of whether a contract is for a "public works project" (App. 15a-16a) or some other aspect of the public's business—like recruiting applicants for the nation's armed services.

2. The Ninth Circuit's decision confining derivative immunity to "public works projects" also is at odds with the opinions of other courts of appeals that have recognized the continuing vitality of *Yearsley* and its application outside those confines. *See, e.g., Butters v. Vance International*, 225 F.3d 462, 466 (4th Cir. 2000) (applying *Yearsley* to private agents of foreign governments); *Tozer v. LTV Corp.*, 792 F.2d 403, 405 (4th Cir. 1986) (recognizing that *Yearsley* is not confined to "construction projects"); *Koutsoubos v. Boeing Vertol*, 755 F.2d 352, 354-55 (3d Cir. 1985) (citing *Yearsley* in products liability case and noting that "federal common law provides a defense to liabilities incurred in the performance of government contracts"); *Tillett v. J.I. Case Co.*, 756 F.2d 591, 596 (7th Cir. 1985) (disapproved on other grounds) (recognizing that "[c]ountless recent cases have examined the reasoning in *Yearsley* in the context of government contracts for weaponry, military hardware and general military equipment"); *Burgess v. Colorado Serum Co.*, 772 F.2d 844, 846 (11th Cir. 1985) (citing *Yearsley* and holding that vaccine manufacturer was entitled to derivative immunity).

This case presents a paradigmatic situation in which the derivative sovereign immunity doctrine was designed to apply. It is undisputed that the Navy is immune from suit under the TCPA (because the United States has not waived its sovereign immunity from suit under that Act). It is undisputed that the

Navy is authorized to contract with firms to help it carry out its vital recruiting mission. And, as the district court explained, the "undisputed" facts show that Campbell-Ewald "acted at the Navy's direction to effectuate [the] text message recruitment campaign" at issue. App. 33a. Certiorari is warranted to review the Ninth Circuit's mistaken ruling that derivative immunity is categorically barred here. And there is no basis to expose government contractors to suits in the Ninth Circuit for activities for which they would be entitled to immunity outside the Ninth Circuit.

III. THIS COURT'S REVIEW IS NEEDED

The jurisdictional issues concern the constitutional authority of the courts. They are critically important to defendants facing an increasingly common form of litigation—class actions seeking statutory damages that, while small on an individualized basis, are staggering on a class-wide basis. The TCPA has been a magnet for such class actions. *See, e.g.*, Allison Grande, *TCPA Class Action Surge Shows No Signs Of Abating*, Law360 (May 24, 2013), *available at* http://www.law360.com/articles/444874/tcpa-class-action-surge-shows-no-signs-of-abating.[6] Not surpris-

---

[6] *See also, e.g.*, Paul F. Corcoran *et al.*, *The Telephone Consumer Protection Act: Privacy Legislation Gone Awry?*, 10 Intell. Prop. & Tech. L.J. 9, 9 (2014) ("Class action litigation under the TCPA has swelled into a rising tide, with TCPA class action cases increasing by 63 percent through most of 2012 according to one study, and the number of TCPA cases in general rising by approximately 70 percent in 2013 and again by over 32 percent in the first half of 2014."); Monica Desai *et al.*, *A TCPA for the 21st Century: Why TCPA Lawsuits Are on the Rise and What*

ingly, the jurisdictional issues presented by this case have arisen in other TCPA actions, as defendants have sought to avoid the costs of protracted litigation while offering to make named plaintiffs whole for any possible individualized harm. *See, e.g.*, *Stein*, 772 F.3d 698 (11th Cir.); *Damasco*, 662 F.3d 891 (7th Cir.).

This case presents an ideal vehicle to decide these issues. Unlike *Genesis Healthcare*, the issue of whether an offer of complete relief moots an individual claim is squarely presented here; Campbell-Ewald presented both a Rule 68 offer of complete relief and a separate settlement offer of complete relief, eliminating any argument that the terms of Rule 68 eliminate a finding of mootness, *cf. Stein*, 772 F.3d at 702-03; and both the Ninth Circuit (App. 4a-7a) and the district court (*id.* at 40a) recognized that Campbell-Ewald's offers would fully satisfy Plaintiff's claim. Moreover, the Ninth Circuit's conclusion in this case—

---

the FCC Should Do About It, 1 Int'l J. Mobile Mktg., 75, 75-76 (2013) ("The TCPA has become fertile ground for nuisance lawsuits because class action lawyers are often rewarded with quick settlements, even in cases without any merit, simply because litigation uncertainty and the potential financial exposure resulting from a bad decision are too great a risk for a company to bear."); U.S. Chamber Institute for Legal Reform, *The Juggernaut of TCPA Litigation: The Problems with Uncapped Statutory Damages* 1 (Oct. 2013) ("[E]ssentially every American business, from large to small, now finds itself at risk of having to defend against a TCPA lawsuit alleging statutory damages thousands of times in excess of any conceivable actual 'damage' associated with the mere receipt of a phone call (even if the call was not answered, and no voicemail left)."

building on the court's prior decisions in *Diaz* and *Pitts*—that Campbell-Ewald's offers of complete relief moot neither an individual nor class claim not only contravenes bedrock Article III principles, but devalues the benefits of settlement and deprives defendants of a critical, and sensible, mechanism for avoiding costly litigation while making plaintiffs whole.

This case also underscores the significant practical consequences of the jurisdictional issues presented for both litigants and the judiciary. Based on the receipt of a single text message designed to recruit for the Navy, Plaintiff filed suit under the TCPA more than three years later for non-recurring conduct. Campbell-Ewald offered to make him whole for any TCPA violation by giving him more than the maximum $1500 he could receive under the Act if he proved a willful violation, plus other relief. Yet Plaintiff declined to accept that offer. As a result, the parties have been forced to spend hundreds of thousands of dollars continuing to litigate this case, even before the issue of class certification has been adjudicated. And, perhaps more to the point, the courts have been forced to superintend that litigation—and "expound[] the law in the course of doing so." *Cuno*, 126 S. Ct. at 1861.

The derivative sovereign immunity question is also indisputably important and independently merits this Court's review. The Ninth Circuit has categorically eliminated a core component of sovereign immunity, placing any government contractor at risk for liability in that circuit for performing valid government contracts servicing critical public needs—including recruiting for our armed forces. This categorical bar is not supported by *Yearsley* and runs counter to longstanding immunity principles. Even if Campbell-

Ewald's authorized efforts to recruit for the good of the Navy and the nation's defense somehow contributed to a TCPA violation, there is no reason Campbell-Ewald should not enjoy the same immunity that the Navy unquestionably would if Plaintiff had aimed his class action demands at the government.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

LAURA A. WYTSMA
CHRISTINE M. REILLY
MEREDITH J. SILLER
LOEB & LOEB LLP
10100 Santa Monica Blvd.
Suite 2200
Los Angeles, CA 90067
(310) 282-2000

GREGORY G. GARRE
Counsel of Record
NICOLE RIES FOX
KATYA S. CRONIN
LATHAM & WATKINS LLP
555 11th Street, NW
Suite 1000
Washington, DC 20004
(202) 637-2207
gregory.garre@lw.com

Counsel for Petitioner

JANUARY 16, 2015

APPENDIX

APPENDIX TABLE OF CONTENTS

Page

Opinion of the United States Court of Appeals for the Ninth Circuit, *Gomez v. Campbell-Ewald Co.*, 768 F.3d 871 (9th Cir. 2014) 1a

Order of the United States District Court for the Central District of California Regarding Defendant's Motion for Summary Judgment and Motion for Summary Judgment on the Pleadings, *Gomez v. Campbell-Ewald Co.*, No. CV 10-02007 DMG (CWx), 2013 WL655237 (C.D. Cal. Feb. 22, 2013) 22a

Order of the United States District Court for the Central District of California Regarding (1) Plaintiff's Motion To Strike [Doc. # 32]; (2) Plaintiff's Motion For Class Certification [Doc. # 33]; and (3) Defendant's Motion To Dismiss [Doc. # 47], *Gomez v. Campbell-Ewald Co.*, 805 F. Supp. 2d 923 (C.D. Cal. Apr. 8, 2011) 35a

Offer of Judgment Pursuant to Federal Rule of Civil Procedure 68, *Gomez v. Campbell-Ewald Co.*, No. CV 10-2007 DMG (CWx) (C.D. Cal. Jan. 5, 2011), ECF No. 31 (with Exhibit 1) 52a

Settlement Offer, *Gomez v. Campbell-Ewald Co.*, No. CV 10-2007 DMG (CWx), dated Jan. 5, 2011 (C.D. Cal. Mar. 11, 2011), ECF No. 45-8 (with enclosure) 57a

APPENDIX TABLE OF CONTENTS

Page

Order of the United States Court of Appeals for the Ninth Circuit for Stay of the Issuance of the Mandate, *Gomez v. Campbell-Ewald Co.*, No. 13-55486 (9th Cir. Oct. 24, 2014).....62a

United States Constitution art. III, § 2.....64a

47 U.S.C. § 227(b)(1), (3).....65a

Federal Rule of Civil Procedure 68(a).....68a

UNITED STATES COURT OF APPEALS, NINTH CIRCUIT

Jose GOMEZ, individually and on behalf of a class of similarly situated individuals, Plaintiff–Appellant,

v.

CAMPBELL–EWALD COMPANY, Defendant–Appellee.

No. 13–55486.
Argued and Submitted July 11, 2014.
Filed Sept. 19, 2014.
768 F.3d 871

Before: FORTUNATO P. BENAVIDES,* KIM MCLANE WARDLAW, and RICHARD R. CLIFTON, Circuit Judges.

OPINION

BENAVIDES, Circuit Judge.

Plaintiff Jose Gomez appeals adverse summary judgment on personal and putative class claims brought pursuant to the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227(b)(1)(A)(iii) (2012). Gomez alleges that the Campbell–Ewald Company instructed or allowed a third-party vendor to send unsolicited text messages on behalf of the United States Navy, with whom Campbell–Ewald had a marketing contract. Because we conclude that Campbell–Ewald is not entitled to immunity, and

---

* The Honorable Fortunato P. Benavides, Senior Circuit Judge for the U.S. Court of Appeals for the Fifth Circuit, sitting by designation.

because we find no alternate basis upon which to grant its motion for summary judgment, we vacate the judgment and remand to the district court.

I.

The facts with respect to Gomez's personal claim are largely undisputed. On May 11, 2006, Gomez received an unsolicited text message stating:

> Destined for something big? Do it in the Navy. Get a career. An education. And a chance to serve a greater cause. For a FREE Navy video call [number].

The message was the result of collaboration between the Navy and the Campbell–Ewald Company,[1] a marketing consultant hired by the Navy to develop and execute a multimedia recruiting campaign. The Navy and Campbell–Ewald agreed to "target" young adults aged 18 to 24, and to send messages only to cellular users that had consented to solicitation. The message itself was sent by Mindmatics, to whom the dialing had been outsourced. Mindmatics was responsible for generating a list of phone numbers that fit the stated conditions, and for physically transmitting the messages. Neither the Navy nor Mindmatics is party to this suit.

In 2010, Gomez filed the present action against Campbell–Ewald, alleging a single violation of 47 U.S.C. § 227(b)(1)(A)(iii), which states:

> It shall be unlawful for any person within the United States, or any person outside the

---

1 The company is now known as Lowe Campbell Ewald.

> United States if the recipient is within the United States—
>
> > (A) to make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice— . . .
> >
> > (iii) to any telephone number assigned to a paging service [or] cellular telephone service . .

Gomez contends that he did not consent to receipt of the text message. He also notes that he was 40 years old at the time he received the message, well outside of the Navy's target market. It is undisputed that a text message constitutes a call for the purposes of this section. *See Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 952 (9th Cir.2009) ("[W]e hold that a text message is a 'call' within the meaning of the TCPA."). In addition to seeking compensation for the alleged violation of the TCPA, Gomez also sought to represent a putative class of other unconsenting recipients of the Navy's recruiting text messages.

After a 12(b)(6) motion to dismiss was denied, Campbell–Ewald tried to settle the case. Campbell–Ewald offered Gomez $1503.00 per violation, plus reasonable costs, but Gomez rejected the offer by allowing it to lapse in accordance with its own terms.

Campbell–Ewald then moved to dismiss the case under Rule 12(b)(1), arguing that Gomez's rejection of the offer mooted the personal and putative class claims. After the court denied the motion, Campbell–Ewald moved for summary judgment, seeking derivative immunity under *Yearsley v. W.A. Ross Construction*

Co., 309 U.S. 18, 60 S.Ct. 413, 84 L.Ed. 554 (1940). In opposition to the summary judgment motion, Gomez presented evidence that the Navy intended the messages to be sent only to individuals who had consented or "opted in" to receive messages like the recruiting text. A Navy representative testified that Campbell–Ewald was not authorized to send texts to individuals who had not opted in. The district court ultimately granted the motion, holding that Campbell–Ewald is "immune from liability under the doctrine of derivative sovereign immunity." *Gomez v. Campbell–Ewald Co.*, No. CV 10–2007 DMG CWX, 2013 WL 655237, at *6 (C.D.Cal. Feb. 22, 2013). Gomez filed a timely appeal, arguing that the *Yearsley* doctrine is inapplicable.

This Court reviews summary judgment *de novo*, affirming only where there exists no genuine dispute of material fact. *Satterfield*, 569 F.3d at 950; *see also* FED.R.CIV.P 56(a). We are free to affirm "on any basis supported by the record." *Gordon v. Virtumundo, Inc.*, 575 F.3d 1040, 1047 (9th Cir.2009).

II.

We begin with jurisdiction. Upon Gomez's timely appeal, Campbell–Ewald filed a motion to dismiss for lack of jurisdiction, arguing that the personal and putative class claims were mooted by Gomez's refusal to accept the settlement offer. We denied that motion without prejudice, and now reject Campbell–Ewald's argument on the merits.

Gomez's individual claim is not moot. Campbell–Ewald argues that "whether or not the class action here is moot," the individual claim was mooted by Gomez's rejection of the offer. The company is

mistaken. Although this issue was unsettled until recently, we have now expressly resolved the question. "[A]n unaccepted Rule 68 offer that would fully satisfy a plaintiff's claim is insufficient to render the claim moot." *Diaz v. First Am. Home Buyers Prot. Corp.*, 732 F.3d 948, 950 (9th Cir.2013). Because the unaccepted offer alone is "insufficient" to moot Gomez's claim, and as Campbell–Ewald identifies no alternate or additional basis for mootness, the claim is still a live controversy.

Similarly, the putative class claims are not moot. We have already explained that "an unaccepted Rule 68 offer of judgment—for the full amount of the named plaintiff's individual claim and made before the named plaintiff files a motion for class certification—does not moot a class action." *Pitts v. Terrible Herbst*, Inc., 653 F.3d 1081, 1091–92 (9th Cir.2011). Like the *Pitts* plaintiff, Gomez rejected the offer before he moved for class certification. Gomez's rejection therefore does not affect any class claims.

Campbell–Ewald recognizes that it is asking this panel to depart from these precedents. Yet it is well settled that we are bound by our prior decisions. *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir.2003) (en banc). Although there is an exception for precedents that have been overruled, that exception applies only where "the relevant court of last resort [has] undercut the theory or reasoning underlying the prior circuit precedent in such a way that the cases are clearly irreconcilable." *Ibid.* Campbell–Ewald argues that *Pitts* and *Diaz* are clearly irreconcilable with the Supreme Court's recent decision in *Genesis Healthcare Corp. v. Symczyk*, — U.S. ——, 133 S.Ct. 1523, 185 L.Ed.2d 636 (2013). Campbell–Ewald overstates the

relevance of that case, which involved a collective action brought pursuant to § 16(b) of the Fair Labor Standards Act. *Id.* at 1526–27. The defendant argued that the case was mooted by the plaintiff's rejection of a settlement offer of complete relief. *Id.* at 1528. The Supreme Court ultimately agreed, first accepting the lower court's conclusion that the personal claim was moot, and then holding that the named plaintiff had "no personal interest in representing putative, unnamed claimants, nor any other continuing interest that would preserve her suit from mootness." *Id.* at 1532.

Campbell–Ewald correctly observes that *Genesis* undermined some of the reasoning employed in *Pitts* and *Diaz*. For example, the *Pitts* opinion referred to the risk that a defendant might "pick off" named plaintiffs in order to evade class litigation. 653 F.3d at 1091 (quoting *Weiss v. Regal Collections*, 385 F.3d 337, 344 (3d Cir.2004)). The *Genesis* Court distanced itself from such reasoning, pointing out that the argument had only been used once by the high Court, and only "in dicta." 133 S.Ct. at 1532 (referring to *Deposit Guar. Nat'l Bank, Jackson, Miss. v. Roper*, 445 U.S. 326, 339, 100 S.Ct. 1166, 63 L.Ed.2d 427 (1980)). Nevertheless, courts have universally concluded that the *Genesis* discussion does not apply to class actions.[2] In fact,

---

[2] At least ten courts had expressly stated that the *Genesis* analysis does not bind courts with respect to class action claims. *E.g., Epstein v. JPMorgan Chase & Co.*, No. 13 Civ. 4744(KPF), 2014 WL 1133567, at *9 (S.D.N.Y. Mar. 21, 2014) ("The court agrees with Plaintiff that these [prior class action] cases were not affected by the Supreme Court's recent decision in *Genesis* . . . ."); *Knutson v. Schwan's Home Serv., Inc.*, No. 3:12–cv–0964–GPC–DHB, 2013 WL 4774763, at *11 (S.D.Cal. Sept.5, 2013) (concluding

Genesis itself emphasizes that "Rule 23 [class] actions are fundamentally different from collective actions under the FLSA" and, therefore, the precedents established for one set of cases are "inapplicable" to the other. 133 S.Ct. at 1529. Accordingly, because *Genesis* is not "clearly irreconcilable" with *Pitts* or *Diaz*, this panel remains bound by circuit precedent, and Campbell–Ewald's mootness arguments must be rejected. *Miller*, 335 F.3d at 900.

III.

Campbell–Ewald's constitutional challenge is equally unavailing. The company argues that the statute is unconstitutional either facially or as applied, but its argument relies upon a flawed application of First Amendment principles. Although the district court did not ultimately reach this issue, the record confirms that the challenge was properly raised below.

We have already affirmed the constitutionality of this section of the TCPA. *Moser v. FCC*, 46 F.3d 970, 973–74 (9th Cir.1995). The government may impose reasonable restrictions on the time, place, or manner of protected speech, provided that the restrictions "are justified without reference to the content of the restricted speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information." *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989) (quoting *Clark v. Cmty. for Creative Non–Violence*, 468 U.S. 288, 293, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984) (other citations omitted)).

---

that *Pitts* was not affected by *Genesis*). We are not aware of any court that has held otherwise.

In analyzing the section, the *Moser* Court focused on the content-neutral statutory language. "Because nothing in the statute requires the [Federal Communications Commission] to distinguish between commercial and noncommercial speech, we conclude that the statute should be analyzed as a content-neutral time, place, and manner restriction."[3] We then upheld the statute after finding that the protection of privacy is a significant interest, the restriction of automated calling is narrowly tailored to further that interest, and the law allows for "many alternative channels of communication." *Id.* at 974–75.

Campbell–Ewald does not contest our reasoning in *Moser*. Instead, Campbell–Ewald argues that the government's interest only extends to the protection of residential privacy, and that therefore the statute is not narrowly tailored to the extent that it applies to cellular text messages. The argument fails. First, this Court already applies the TCPA to text messages. *Satterfield*, 569 F.3d at 951–52. Second, there is no evidence that the government's interest in privacy ends at home—the fact that the statute reaches fax machines suggests otherwise. *See* 47 U.S.C. § 227(b)(1)(C). Third, to whatever extent the government's significant interest lies exclusively in residential privacy, the nature of cell phones renders

---

[3] 46 F.3d at 973. Campbell–Ewald does not argue that the statute is no longer content neutral insofar as some implementing regulations distinguish between commercial and noncommercial calls. *See* 47 C.F.R. § 64.1200(a)(2) (2014); *cf. Destination Ventures, Ltd. v. FCC*, 46 F.3d 54, 56 (9th Cir.1995) (holding that the TCPA's treatment of commercial facsimile transmissions, 42 U.S.C. § 227(b)(1)(C), is a constitutionally permitted content-based restriction).

the restriction of unsolicited text messaging all the more necessary to ensure that privacy. After all, it seems safe to assume that most cellular users have their phones with them when they are at home. Campbell–Ewald itself notes that in many households a cell phone *is* the home phone. In fact, recent statistics suggest that over 40% of American households now rely exclusively on wireless telephone service.[4] As a consequence, prohibiting automated calls to land lines alone would not adequately safeguard the stipulated interest in residential privacy. For all these reasons, Campbell–Ewald's argument is without merit.

Nor does the government speech doctrine provide Campbell–Ewald with a meritorious constitutional challenge. Campbell–Ewald argues that military recruiting messages are a form of government speech afforded greater protection by the First Amendment. Campbell–Ewald mischaracterizes the doctrine. The government speech doctrine is a jurisprudential theory by which the federal government can regulate its own communication "without the constraint of viewpoint neutrality." *Downs v. L.A. Unified Sch. Dist.*, 228 F.3d 1003, 1017 (9th Cir.2000), *cert. denied*, 532 U.S. 994, 121 S.Ct. 1653, 149 L.Ed.2d 636 (2001). For example, the First Amendment does not require the federal government to fund messages both for and against abortion. *Cf. Rust v. Sullivan*, 500 U.S. 173, 203, 111 S.Ct. 1759, 114 L.Ed.2d 233 (1991) (upholding, under the government speech doctrine, regulations forbid-

---

[4] *See* Karen Kaplan, *Still have a land line? 128 million don't.*, L.A. TIMES, July 8, 2014, http:// www. latimes. com/ science/ sciencenow/ la- sci- sn- wireless- only- householdsin- america- 20140708- story. html.

ding certain publicly funded doctors from endorsing abortion). Similarly, in this context, the doctrine would preclude Campbell–Ewald from demanding that the Navy create an advertising campaign that discourages military participation. The government speech doctrine is simply immaterial to the present dispute, in which the plaintiff is not advocating for viewpoint neutrality, but is instead challenging the regulation of a particular means of communication.

IV.

Campbell–Ewald nevertheless argues that it cannot be held liable for TCPA violations because it outsourced the dialing and did not actually make any calls on behalf of its client. *See* 47 U.S.C. § 227(b)(1)(A)(iii) (rendering it unlawful "to make any call" using an automated dialing system). Gomez, in fact, concedes that a third party transmitted the disputed messages. Even so, Campbell–Ewald's argument is not persuasive.

Although Campbell–Ewald did not send any text messages, it might be vicariously liable for the messages sent by Mindmatics. The statute itself is silent as to vicarious liability. We therefore assume that Congress intended to incorporate "ordinary tort-related vicarious liability rules." *Meyer v. Holley*, 537 U.S. 280, 285, 123 S.Ct. 824, 154 L.Ed.2d 753 (2003). Accordingly, "[a]bsent a clear expression of Congressional intent to apply another standard, the Court must presume that Congress intended to apply the traditional standards of vicarious liability . . ." *Thomas v. Taco Bell Corp.*, 879 F.Supp.2d 1079, 1084 (C.D.Cal.2012), *aff'd*, 582 Fed.Appx. 678, 2014 WL 2959160 (9th Cir. July 2, 2014) (per curiam). Although we have never expressly reached this question, several

of our district courts have already concluded that the TCPA imposes vicarious liability where an agency relationship, as defined by federal common law, is established between the defendant and a third-party caller.[5]

This interpretation is consistent with that of the statute's implementing agency, which has repeatedly acknowledged the existence of vicarious liability under the TCPA. The Federal Communications Commission is expressly imbued with authority to "prescribe regulations to implement the requirements" of the TCPA. 47 U.S.C. § 227(b)(2). As early as 1995, the FCC stated that "[c]alls placed by an agent of the telemarketer are treated as if the telemarketer itself placed the call." *In re Rules and Regulations Implementing the TCPA of 1991*, 10 FCC Rcd. 12391, 12397 (1995). More recently, the FCC has clarified that vicarious liability is imposed "under federal common law principles of agency for violations of either section 227(b) or section 227(c) that are committed by third-party telemarketers." *In re Joint Petition Filed by Dish Network*, LLC, 28 FCC Rcd. 6574, 6574 (2013). Because Congress has not spoken directly to this issue and because the FCC's interpretation was included in a fully adjudicated declaratory ruling, the interpretation must be afforded *Chevron* deference. *Metrophones Telecomms., Inc. v. Global Crossing Telecomms., Inc.*, 423 F.3d 1056, 1065 (9th Cir.2005) (citing *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S.

---

5 *Ibid. See also Kristensen v. Credit Payment Servs.*, No. 2:12–CV–00528–APG, 12 F.Supp.3d 1292, 2014 WL 1256035 (D.Nev. Mar. 26, 2014); *In re Jiffy Lube Int'l Inc.*, 847 F.Supp.2d 1253 (S.D.Cal.2012); *Kramer v. Autobytel, Inc.*, 759 F.Supp.2d 1165 (N.D.Cal.2010).

967, 980–85, 125 S.Ct. 2688, 162 L.Ed.2d 820 (2005)) (other citations omitted), *aff'd*, 550 U.S. 45, 127 S.Ct. 1513, 167 L.Ed.2d 422 (2007); *see also Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 843, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984) ("If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation." (footnote omitted)).

Campbell–Ewald concedes that the FCC already recognizes vicarious liability in this context, but argues that vicarious liability only extends to the merchant whose goods or services are being promoted by the telemarketing campaign. Yet the statutory language suggests otherwise, as § 227(b) simply imposes liability upon "any person"—not "any merchant." *See Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 221, 128 S.Ct. 831, 169 L.Ed.2d 680 (2008) (interpreting the use of "any" as "all-encompassing"); 47 C.F.R. § 64.1200 (interpreting the phrase "any person" to reach individuals and entities). And although the FCC's 2013 ruling may emphasize vicarious liability on the part of merchants, the FCC has never stated that vicarious liability is only applicable to these entities.[6] Indeed,

---

[6] *Dish Network*, 28 FCC Rcd. at 6574. The FCC uses the word "seller," which Campbell–Ewald construes as the merchant whose goods or services are featured in the telemarketing campaign. The FCC actually defines seller as an "entity on whose behalf a telephone call or message is initiated for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services." *See* 47 C.F.R. § 64.1200(f)(9). We need not determine whether Campbell–Ewald constitutes a seller under this definition, as we conclude that vicarious liability turns on the

such a construction would contradict "ordinary" rules of vicarious liability, *Meyer*, 537 U.S. at 285, 123 S.Ct. 824, which require courts to consider the interaction between the parties rather than their respective identities. *See* RESTATEMENT (THIRD) OF AGENCY (2006) §§ 2.01, 2.03, 4.01 (explaining that agency may be established by express authorization, implicit authorization, or ratification).

Given Campbell–Ewald's concession that a merchant can be held liable for outsourced telemarketing, it is unclear why a third-party marketing consultant shouldn't be subject to that same liability. As a matter of policy it seems more important to subject the consultant to the consequences of TCPA infraction. After all, a merchant presumably hires a consultant in part due to its expertise in marketing norms. It makes little sense to hold the merchant vicariously liable for a campaign he entrusts to an advertising professional, unless that professional is equally accountable for any resulting TCPA violation. In fact, Campbell–Ewald identifies no case in which a defendant was exempt from liability due to the outsourced transmission of the prohibited calls.

Moreover, our own precedent belies any argument that liability is not possible. In our seminal case regarding text messages and the TCPA, we allowed a case to proceed against an analogous marketing consultant who was not "responsible for the actual transmission of the text messages." *See Satterfield*, 569 F.3d at 951. In *Satterfield*, a publisher had instructed a marketing consultant to create a text

---

satisfaction of relevant standards of agency, irrespective of a defendant's nominal designation.

message campaign advertising a new Stephen King novel. *Id.* at 949. The consultant in turn outsourced the recipient selection and message transmission to two other subcontractors. *Id.* A recipient sued both the publisher and the marketing consultant for alleged violations of the TCPA. *Id.* at 950. The district court entered summary judgment in favor of both defendants, holding that the cellular user had consented to receive advertisements when it signed its cellular service contract. *Id.* We ultimately reversed and remanded the case, holding (*inter alia*) that the cellular service agreement did not constitute "express consent" to receive the advertisement in dispute. *Id.* at 955. So although we did not explain the basis of the defendants' potential liability, we implicitly acknowledged the existence of that basis. The present case affords an opportunity to clarify that a defendant may be held vicariously liable for TCPA violations where the plaintiff establishes an agency relationship, as defined by federal common law, between the defendant and a third-party caller.

Before moving on, we should note that Gomez asks us to endorse another potential source of liability by holding that direct liability applies where a third party is "closely involved" in the placing of the calls. Because the facts are not yet developed, the present case does not require such a determination. We therefore leave that question for another day. *See United States v. Manning*, 527 F.3d 828, 837 n. 8 (9th Cir.2008) ("[W]e simply express no view on issues unnecessary to this [decision]." (citation omitted)).

V.

Finally, we turn to the legal theory underlying the district court's decision. The court entered summary

judgment after concluding that Campbell-Ewald is exempt from liability under *Yearsley*, 309 U.S. 18, 60 S.Ct. 413. Gomez contends that *Yearsley* is outdated and inapposite, and that the district court should have applied the standard articulated in *Boyle v. United Technologies Corp.*, 487 U.S. 500, 108 S.Ct. 2510, 101 L.Ed.2d 442 (1988). The availability of these defenses is a question of law that we review *de novo*. *In re Hanford Nuclear Reservation Litig.*, 534 F.3d 986, 1000 (9th Cir.2008).

After reviewing the relevant law, we agree with Gomez that *Yearsley* is not applicable. *Yearsley* established a narrow rule regarding claims arising out of property damage caused by public works projects. The dispute involved erosion caused by efforts to render the Missouri River more navigable. *Yearsley*, 309 U.S. at 19, 60 S.Ct. 413. The Court reasoned that if—as alleged—the contractor's work was in accordance with express Congressional directive and resulted in an unconstitutional taking of property, "the Government has impliedly promised to compensate the plaintiffs and has afforded a remedy for its recovery by a suit in the Court of Claims." *Id.* at 21–22, 60 S.Ct. 413 (citing 28 U.S.C. § 250 (1940)) (other citations omitted). As a consequence, there was an adequate remedy available and no need for action against the private contractor. *Id.* at 22, 60 S.Ct. 413.

It seems clear that the reasoning employed by the *Yearsley* Court is not relevant here. Gomez's claims do not implicate a constitutional "promise to compensate" injured plaintiffs such that an alternate remedy exists. Nor does the case belong in some other venue. *Cf. Myers v. United States*, 323 F.2d 580, 583 (9th Cir.1963) (remanding under *Yearsley* for transfer to Court of

Claims). Instead, Congress has expressly created a federal cause of action affording individuals like Gomez standing to seek compensation for violations of the TCPA. In the seventy-year history of the *Yearsley* doctrine, it has apparently never been invoked to preclude litigation of a dispute like the one before us. This Court, in particular, has rarely allowed use of the defense, and only in the context of property damage resulting from public works projects.

In its brief discussion, the district court did not explain its decision to apply *Yearsley* to the facts and issues at bar. The cases cited by the court do not support such an interpretation.[7] At oral argument, we asked Campbell–Ewald to name any authority that might justify the application of *Yearsley* to the facts of this case. Campbell–Ewald responded by pointing to a recent Fifth Circuit decision dismissing a class action under *Yearsley*. *See Ackerson*, 589 F.3d 196. Yet that case—like *Yearsley* itself—involved allegations of property damage resulting from dredging work undertaken to improve the nation's waterways. *Id.* at 202–03 (listing allegations that the United States and its contractors had irreparably damaged Louisiana's coastline and wetlands in the 1960s, ultimately contributing to the widespread loss of property during Hurricane Katrina). So while the Fifth Circuit's decision may rebut Gomez's argument that *Yearsley* is

---

[7] *See Ackerson v. Bean Dredging LLC*, 589 F.3d 196, 204–07 (5th Cir.2009) (applying *Yearsley* in traditional public works context); *Butters v. Vance Int'l Inc.*, 225 F.3d 462, 466 (4th Cir.2000) (adjudicating immunity under the Foreign Sovereign Immunity Act); *Myers*, 323 F.2d at 583 (applying *Yearsley* to property loss resulting from highway construction).

stale precedent, it does not warrant application of the doctrine to the present dispute.

Nor does the *Boyle* pre-emption doctrine provide Campbell–Ewald with a relevant defense. The doctrine precludes state claims where the imposition of liability would undermine or frustrate federal interests. *See Nielsen v. George Diamond Vogel Paint Co.*, 892 F.2d 1450, 1454 (9th Cir.1990) (explaining that the *Boyle* standard is used to determine when "federal law should displace state law"). *Boyle* involved a wrongful death action brought under Virginia law against a government contractor that had supplied a helicopter to the United States military. *See* 487 U.S. at 502, 108 S.Ct. 2510. After a jury returned a verdict in favor of the plaintiffs, the Fourth Circuit reversed, holding that liability was precluded in part by the federal interest inherent in military decisions. *Id.* at 503, 510, 108 S.Ct. 2510. The Supreme Court agreed, explaining that when "an area of uniquely federal interest" is implicated by a federal purchase, state law is displaced where "a significant conflict exists between an identifiable federal policy or interest and the operation of state law, or the application of state law would frustrate specific objectives of federal legislation ." *Id.* at 507, 108 S.Ct. 2510 (internal brackets, quotation marks, and citations omitted). The Court then remanded after establishing a rule by which courts should determine whether a specific contractor is acting pursuant to a military contract such that the defense is available. *Id.* at 512, 108 S.Ct. 2510.

Although *Boyle* in effect created a defense for some government contractors, it is fundamentally a pre-emption case. The *Boyle* Court established two related rules: (1) a general rule whereby state claims may be

pre-empted by federal law, and (2) a specific rule whereby certain military contractors may be exempt from state tort liability in furtherance of that pre-emption. 487 U.S. at 507–08, 512, 108 S.Ct. 2510. In arguing that *Boyle* governs here, Gomez overlooks the pre-emption predicate, assuming that *Boyle* represents a general grant of immunity for government contractors. Yet *Boyle* itself includes footnotes emphasizing the displacement question and indicating that it should not be construed as broad immunity precedent. *Id.* at 505 n. 1, 508 n. 3, 108 S.Ct. 2510. We have already clarified this point, explaining that *Boyle* "is directed toward deciding the extent to which federal law should displace state law with respect to the liability of a military contractor." *Nielsen*, 892 F.2d at 1454. Accordingly, although *Boyle* may apply more broadly than to the facts of that case alone, that broader applicability is rooted in pre-emption principles and not in any widely available immunity or defense.

Returning to the present case, Gomez brings a claim under federal law, so pre-emption is simply not an issue. The *Boyle* doctrine is thus rendered inapposite. Even Campbell–Ewald—notwithstanding a vested interest in maintaining every possible means of exoneration—admits that a *Boyle* defense is not permissible here. Because the defendant does not assert a *Boyle* defense, we need not belabor the present discussion—we accept Campbell–Ewald's concession that *Boyle* is not relevant.

Campbell–Ewald contends that a new immunity for service contractors was espoused by the Supreme Court in *Filarsky v. Delia*, — U.S. —, 132 S.Ct. 1657, 182 L.Ed.2d 662 (2012). Yet the Court did not

establish any new theory, and although the *Filarsky* discussion does include a broad reading of the qualified immunity doctrine, *id.* at 1667–68, that doctrine is not implicated by this case. *Filarsky* involved alleged constitutional violations brought pursuant to 42 U.S.C. § 1983. *See id.* at 1661. The Supreme Court granted certiorari to resolve a dispute as to whether one of the defendants—an attorney contracted by municipal government—was eligible for the qualified immunity afforded to his city-employed colleagues. *Id.* at 1660–61. To determine the scope of the doctrine, the Court examined "the 'general principles of tort immunities and defenses' applicable at common law." *Id.* at 1662 (quoting *Imbler v. Pachtman*, 424 U.S. 409, 418, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976)). When the examination revealed that part-time and lay officials had been granted immunity throughout the nineteenth century, *id.* at 1665, the Court concluded that the contractor was properly entitled to the same qualified immunity enjoyed by his publicly employed counterparts.

Filarsky has little to offer Campbell–Ewald. The decision is applicable only in the context of § 1983 qualified immunity from personal tort liability. *See, e.g., ibid.* ("[I]mmunity under § 1983 should not vary depending on whether an individual working for the government does so as a full-time employee, or on some other basis."). Moreover, the Court afforded immunity only after tracing two hundred years of precedent. Here, not only do we lack decades or centuries of common law recognition of the proffered defense, we are aware of *no* authority exempting a marketing consultant from analogous federal tort liability.

Nor are we persuaded that we should establish the novel immunity asserted by defendants. As the Supreme Court has recognized, immunity "comes at a great cost." *Westfall v. Erwin*, 484 U.S. 292, 295, 108 S.Ct. 580, 98 L.Ed.2d 619 (1988), *superseded by statute on other grounds*, Pub.L. No. 100–694, 102 Stat. 4563 (1988), codified at 28 U.S.C. § 2679(d), *as recognized in Adams v. United States*, 420 F.3d 1049, 1052 (9th Cir.2005). Where immunity lies, "[a]n injured party with an otherwise meritorious tort claim is denied compensation," which "contravenes the basic tenet that individuals be held accountable for their wrongful conduct." *Westfall*, 484 U.S. at 295, 108 S.Ct. 580. Accordingly, immunity must be extended with the utmost care. The record contains sufficient evidence that the text messages were contrary to the Navy's policy permitting texts only to persons who had opted in to receive them. Consequently, we decline the invitation to craft a new immunity doctrine or extend an existing one.

VI.

As explained herein, Campbell–Ewald's four arguments in support of summary judgment each fail. And because the motion was based on pure questions of law, we were not briefed on the factual predicates of liability. Campbell–Ewald has therefore not carried its burden to demonstrate an absence of material fact or to show that it is otherwise "entitled to judgment as a matter of law." FED.R.CIV.P. 56(a). Accordingly, we VACATE the district court's order and remand the case for further proceedings consistent with this opinion.

VACATED and REMANDED.

The costs shall be taxed against the Defendant–Appellee.

UNITED STATES DISTRICT COURT, C.D. CALIFORNIA

Jose GOMEZ, Plaintiff,

v.

CAMPBELL–EWALD COMPANY, Defendant.

No. CV 10–02007 DMG (CWx).

Feb. 22, 2013.

2013 WL 655237

ORDER RE DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND MOTION FOR JUDGMENT ON THE PLEADINGS

DOLLY M. GEE, District Judge.

This matter is before the Court on Defendant Campbell–Ewald Company's ("C–E") motion for summary judgment [Doc. # 115] and motion for judgment on the pleadings [Doc. # 130]. The Court held a hearing on March 30, 2012. For the reasons set forth below, Defendant's motion for summary judgment is GRANTED and motion for judgment on the pleadings is DENIED.

I.

PROCEDURAL HISTORY

On March 19, 2010, Plaintiff filed a class action complaint in this Court alleging a single cause of action for violation of the Telephone Consumer Protection Act, 47 U.S.C. § 227 *et seq.* ("TCPA").

Defendant filed a motion for summary judgment on October 18, 2011. Plaintiff filed an opposition on October 25, 2011 and a supplemental opposition on March 5, 2012. Defendant filed a reply on March 19,

2012. The parties filed supplemental briefs following the hearing. [Doc.218–220, 223, 225–227, 229.]

Defendant filed a motion for judgment on the pleadings on November 7, 2011. Plaintiff filed an opposition on October 14, 2011. Defendant filed a reply on November 21, 2011.

II.

FACTUAL BACKGROUND

As it must on this motion for summary judgment, the Court sets forth the material undisputed facts and views all reasonable inferences to be drawn from them in the light most favorable to Plaintiff, the non-moving party.

C–E is a global advertising agency that provides marketing services to clients throughout the United States, including the United States Navy. (Declaration of Daniel Rioux ("Rioux Decl.") ¶ 1.) C–E is the Navy's advertising agent of record. (Declaration of Lee Buchschacher ("Buchschacher Decl.") ¶ 3.) Beginning in 2000, C–E contracted with the Navy to assist it in achieving its recruitment goals. (*Id.* ¶¶ 3–4; Rioux Decl. ¶ 3.) Navy Recruiting Command ("NRC") is the recruiting arm of the Navy that is devoted solely to Naval recruitment efforts. (Buchschacher Decl. ¶ 2.)

C–E entered into its first base or master contract with the Navy in September 2000 (the "2000 Base Contract"). (Auger Decl. ¶ 3.) The 2000 Base Contract provides as follows:

> Services to be performed include *all* advertising-related services, directly prescribed by the Contracting Officer or proposed by the contractor and approved for implementation by the Contracting Officer. In all instances, the Commander Navy

> Recruiting Command (CNRC) holds the ultimate right of approval for all deliverables under this contract.

(Auger Decl. ¶ 3, Ex. 1; emphasis in original [Doc. # 212 at 22] .)

On September 21, 2005, C–E and the Navy executed order "VJBB" pursuant to the Navy's request and authorization for C–E to acquire additional media under the 2000 Base Contract for the purpose of supporting the Navy's recruitment efforts in 2006. (Auger Decl. ¶ 5; Rioux Decl. ¶ 4, Ex. 1.) On September 27, 2005, C–E and the Navy executed an amendment to the VJBB Order that authorized an increase in funds for the additional media requested by the Navy. (Auger Decl. ¶ 6; Rioux ¶ 5, Ex. 2.)

On or about December 16, 2005, C–E submitted a proposed media plan, as requested by the Navy. (Auger Decl. ¶ 7; Buchschacher Decl. ¶ 6, Ex. 2.) Among the various media was Exploratory Media, which included an option for "Wireless/Mobile Marketing to Expand on Navy's Direct Response efforts via SMS [text messaging] and WAP [wireless application protocol]." (Buchschacher Decl. ¶ 6, Ex. 2 at 15.) Fleet Industrial Supply Center ("FISC"), the Navy's contracting administrator, and NRC approved the wireless/mobile marketing option for 2006. (*Id.* Ex. 2 at 2.)

On January 4, 2006, a second amendment was made to the VJBB Order under the 2000 Base Con-tract in order to incorporate the December 16, 2005 media plan. (Auger Decl. ¶ 8; Rioux Decl. ¶ 5, Exs. 2–4.) The amendment included funds for "exploratory media" pursuant to that 2005 plan and provided that all media

placement was to be completed on or before August 19, 2006. (Auger Decl. ¶ 8.)

On February 13, 2006, C–E issued a request for proposal for "executing wireless advertising from April–June, 2006 on behalf of [its] client, the United States Navy." (Rioux Decl. ¶ 7, Ex. 5.) The goal of the 2006 wireless strategy was to "recruit nearly 38,000 Active Duty, General Enlisted sailors," with the "[p]rimary target [being] male, 17-1/2 to 24 year[ ] old students; already in the workforce secondary." (*Id.*)

In response to C–E's request for proposals, MindMatics LLC submitted proposals dated February 22, 2006 and April 2, 2006. (Rioux Decl. ¶ 8, Exs. 6–7.) On March 17, 2006, C–E gave a PowerPoint presentation to NRC entitled "Navy 2006 Wireless/Mobile Tactical Media recommendations," which outlined "Exploratory Media" options consistent with the Navy's goals. (Rioux Decl. ¶ 10, Ex. 8; Buchschacher Decl. ¶ 8, Ex. 3.) The 2006 presentation included a text message proposal from MindMatics to deliver a "Navy branded SMS (text) direct mobile 'push' program to the cell phones of 150,000 Adults 18–24 from an opt-in list of over 3 million." (Buchscahcher Decl. ¶ 9, Ex. 3.) CE was required to obtain NRC approval to proceed. (*Id.*)

The NRC "worked closely with C–E on the Navy's May 2006 text message recruiting campaign, and provided Navy oversight and approval. (*Id.* ¶ 11.) Lee Buchschacher, as the Deputy Director, Marketing and Advertising Plans Division, for the NRC and Cornell Galloway, an Enlisted Program Advertising Manager, "authorized and approved the text message campaign proposed by MindMatics on behalf of NRC." (*Id.* ¶ 12; Rioux Decl. ¶ 12.) Buchschacher "also reviewed,

revised, and approved the creative for the Navy's text message." (Buchschacher Decl. ¶ 12, Exs. 4–5; Rioux Decl. ¶ 12, Ex. 9) The Navy approved the following message to potential Naval recruits:

> Destined for something big? Do it in the navy. Get a career.
>
> An education. And a chance to serve a greater cause. For a FREE Navy video call 1–800–510–2074.

(Buchscahcher Decl. ¶ 12, Ex. 5; Rioux Decl. ¶ 12, Ex. 9.)

Between May 10 and May 24, 2006, text messages were sent by MindMatics to potential Naval recruits between the ages of 18 and 24. (Rioux Decl. ¶ 13.) C–E did not send the text messages and never saw or took possession of the mobile numbers used for the Navy's text message campaign. (Rioux Decl. ¶ 13.) Instead, MindMatics handled the deployment, transmission and delivery of the text messages, including the use of its own SMS short code. (Rioux ¶ 13, Ex. 10.)

Plaintiff received a text message from SMS shortcode 43704 on May 10, 2006. (Reilly Decl. ¶ 6, Ex. 5; Gomez Depo. at 35, Ex. 1.)

III.
C–E'S MOTION FOR JUDGMENT ON THE PLEADINGS[1]

In its motion for judgment on the pleadings, Defendant contends that Plaintiff's claim is time-barred by an Illinois two-year statute of limitations because Plaintiff filed his complaint almost four years after he received the allegedly unlawful text message at issue in this case. The crux of Defendant's position is that Congress intended for courts to apply state law to TCPA claims and, therefore, the state statute of limitations applies to such claims.

Since the time that Defendant filed its motion, however, the United States Supreme Court issued its decision in *Mims v. Arrow Financial Services, LLC*, — U.S. —, 132 S.Ct. 740, 181 L.Ed.2d 881 (2012). In *Mims*, the Supreme Court clarified that federal and

---

[1] Judgment on the pleadings is properly granted only when, taking all the factual allegations in the pleadings as true, "the moving party is entitled to judgment as a matter of law." *Dunlap v. Credit Protection Ass'n*, L.P., 419 F.3d 1011, 1012 n. 1 (9th Cir.2005) (*per curiam*) (quoting *Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 713 (9th Cir.2001)) (quotation marks omitted). A court must construe the factual allegations in the pleadings in the light most favorable to the non-moving party. *Fleming v. Pickard*, 581 F.3d 922, 925 (9th Cir.2009) (citing *Turner v. Cook*, 362 F.3d 1219, 1225 (9th Cir.2004)). Thus, motions under Rule 12(c) are "functionally identical" to motions under Rule 12(b). *Dworkin v. Hustler Magazine Inc.*, 867 F.2d 1188, 1192 (9th Cir.1989). Upon granting a motion for judgment on the pleadings, a court should grant leave to amend unless it "determines that the pleading could not possibly be cured by the allegation of other facts." *Knappenberger v. City of Phoenix*, 566 F.3d 936, 942 (9th Cir.2009) (quoting *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir.2000) (*en banc*)) (quotation marks omitted).

state courts have concurrent jurisdiction over private suits arising under the TCPA *and* uniform application. The Supreme Court also noted that, in enacting the TCPA, Congress "enacted detailed, uniform, federal substantive prescriptions and provided for a regulatory regime administered by a federal agency" and that "TCPA liability thus depends on violation of a federal statutory requirement or an FCC regulation, §§ 227(b)(3)(A), (c)(5), not on a violation of any state substantive law." *Id.* at 751.

In light of the Supreme Court's ruling in *Mims* that the TCPA is intended to have uniform application, the Court finds that the four-year statute of limitations in 28 U.S.C. § 1658 applies to TCPA claims.[2]

The Court therefore denies Defendant's motion for judgment on the pleadings.

IV.

C–E'S MOTION FOR SUMMARY JUDGMENT

A. *Legal Standard*

Summary judgment should be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to

---

[2] The federal "catchall" limitations statute, 28 U.S.C. § 1658 provides that:

> Except as otherwise provided by law, a civil action arising under an Act of Congress enacted after the date of the enactment of this section may not be commenced later than 4 years after the cause of action accrues.

28 U.S.C. § 1658. A cause of action is governed by 28 U.S.C. § 1658 "if the plaintiff's claim against the defendant was made possible by a post–1990 enactment." *Jones v. R.R. Donnelly & Sons Co.*, 541 U.S. 369, 382, 124 S.Ct. 1836, 158 L.Ed.2d 645 (2004). The TCPA was enacted in 1991.

judgment as a matter of law." Fed.R.Civ.P. 56(a); *accord Wash. Mut. Inc. v. United States*, 636 F.3d 1207, 1216 (9th Cir.2011). Material facts are those that may affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). A dispute is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* Partial summary judgment may be sought on any claim or defense, or part thereof, and the court may grant less than all of the relief requested by the motion. *See* Fed.R.Civ.P. 56(a), (g).

The moving party bears the initial burden of establishing the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Once the moving party has met its initial burden, Rule 56(c) requires the nonmoving party to "go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" *Id.* at 324 (quoting Fed.R.Civ.P. 56(c), (e) (1986)); *see also Norse v. City of Santa Cruz*, 629 F.3d 966, 973 (9th Cir.2010) (*en banc*) ("Rule 56 requires the parties to set out facts they will be able to prove at trial."). "[T]he inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).

B. ***Discussion***

Gomez alleges a single cause of action for violation of the TCPA. C–E contends, *inter alia*, that Gomez's claim fails as a matter of law because, insofar as the

Navy is immune from liability under the TCPA, C–E is also immune as a result of derivative sovereign immunity.

Because the United States cannot be sued without the consent of Congress, *Block v. North Dakota ex rel. Bd. Of Univ. & Sch. Lands*, 461 U.S. 273, 287, 103 S.Ct. 1811, 75 L.Ed. 840 (1983), and Congress did not consent to TCPA suits against the federal government, 47 U.S.C. § 227(b)(1), the Navy cannot be sued for violation of the TCPA. Indeed, "[s]overeign immunity is jurisdictional in nature. *FCIC v. Meyer*, 510 U.S. 471, 475, 114 S.Ct. 996, 127 L.Ed.2d 308 (1994). "[W]aiver of [immunity] must be unequivocally expressed in statutory text and will not be implied." *Lane v. Pena*, 518 U.S. 187, 192, 116 S.Ct. 2092, 135 L.Ed.2d 486, ——, 135 L.Ed. 486 (1996).

Inasmuch as C–E acted on behalf of the Navy, it is also immune under the doctrine of derivative sovereign immunity established by the Supreme Court in *Yearsley v. W.A. Ross Constr. Co.*, 309 U.S. 18, 21–22, 60 S.Ct. 413, 84 L.Ed. 554 (1940). In *Yearsley*, the Supreme Court held that, "if [the] authority to carry out the project was validly conferred ... there is no liability on the part of the contractor for executing [the Government's] will." 309 U.S. at 20–21. An agent is liable only if "he exceeded his authority or that [the authority] was not validly conferred." *Id.* at 21; *see also Butters v. Vance Int'l, Inc.*, 225 F.3d 462, 466 (4th Cir.2000) (it is "well-settled law that contractors and common law agents acting within the scope of their employment for the United States have derivative sovereign immunity").

Gomez does not contend disagree that the Navy is immune. Instead, citing to the Ninth Circuit's decision

in *In re Hawaii Fed. Asbestos Cases*, 960 F.2d 806 (9th Cir.1992), Gomez takes the position that C–E must meet the five-factor test established in the later decision *Boyle v. United Technologies Corp.*, 487 U.S. 500, 108 S.Ct. 2510, 101 L.Ed.2d 442 (1988), in which the Supreme Court applied the concept of derivative sovereign immunity to military contractors. (Pl.'s Opp'n at 4; citing *In re Hawaii*, 960 F.2d at 811.)

Gomez's reliance on *Boyle* and *In re Hawaii* is misplaced. In fact, the Ninth Circuit could not have been more explicit in *In re Hawaii* that the military contractor defense outlined in *Boyle* applies to the specific situation in which a contractor produces military equipment for the Government.[3] "The *Boyle* Court repeatedly described the military contractor defense in terms limiting it to those who supply military equipment to the government." *In re Hawaii*, 960 F.2d at 810 (citing *Boyle*, 487 U.S. at 512)). "The fact that the military may order such products does not make them 'military equipment.'" *Id.* at 811. Rather, the limitation of liability "only with respect to the military equipment they produce for the United States is consistent with the purposes the Court ascribes to that defense" and that those "same concerns do not

---

[3] The military contractor defense set forth in *Boyle* "immunizes contractors who supply military equipment to the government from the duties imposed by state tort law" and prohibits the imposition of liability when "(1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States." *In re Hawaii*, 960 F.2d at 810 (citing *Boyle*, 487 U.S. at 512).

exist in respect to products readily available on the commercial market." *Id.* at 811.

Gomez addresses *Yearsley's* applicability to this case in a single footnote and points to no evidence indicating that C–E exceeded the scope of its authority to send the text message at issue. Instead, relying on *In re Hanford*, 534 F.3d 986 (9th Cir.2007), Gomez contends that *Yearsley* is limited to "principal-agent relationships where the agent had no discretion in the design process and completely followed government specifications," *id.* at 1001, and that, in any event, C–E was not acting as the Navy's agent. (Pl.'s Opp'n at 4 n. 1.)

Gomez's reliance on *In re Hanford* is equally unavailing. The issue before the court in *In re Hanford* was whether the Price Anderson Act preempted reliance on the common law doctrine of derivative sovereign immunity. In its analysis, the Ninth Circuit interpreted *Yearsley* as limiting "the applicability of the defense to principal-agent relationships where the agent had no discretion in the design process and completely followed government specifications." *In re Hanford*, 534 F.3d at 1001.

Yet, *Yearsley* does not preclude contractors such as C–E from invoking derivative immunity. *See* 309 U.S. at 20–21 ("if [the] authority to carry out the project was validly conferred there is no liability on the part of the contractor for executing [the Government's] will"); *see also Ackerson v. Bean Dredging LLC*, 589 F.3d 196, 205 (5th Cir.2009) ("*Yearsley* does not use the word 'agent' but also uses 'contractor' and 'representative"). *Yearsley* did not at all examine the contractor's relationship with the government to determine whether there was an agency relationship

and the Ninth Circuit applied *Yearsley* without any discussion of an agency relationship in *Myers v. U.S.*, 323 F.2d 580, 583 (9th Cir.1963). *See Ackerson*, 589 F.3d at 206 (cataloging federal court decisions applying *Yearsley* without an agency relationship analysis).

The Fourth Circuit has similarly recognized that "courts define the scope of sovereign immunity by the nature of the function being performed-not by the office or the position of the particular employee involved." *Butters*, 225 F.3d at 466 ("As a result, courts have extended derivative immunity to private contracts, particularly in light of the government's unquestioned need to delegate governmental functions").

Here, it is undisputed that the Navy contracted with C–E to obtain advertising-related services, subject to ultimate approval by the NRC. That 2000 Base Contract was later amended in order to include advertising to support the Navy's recruitment efforts and included an option for wireless marketing. Pursuant to those agreements, C–E acted at the Navy's direction to effectuate a text message recruitment campaign. C–E presents uncontroverted evidence in which the Navy states unequivocally that it "worked closely with C–E on the Navy's May 2006 text message recruiting campaign, and provided Navy oversight and approval. (Buchschacher Decl. ¶ 11.) The Navy "also reviewed, revised, and approved the creative [sic] for the Navy's text message." (Buchschacher Decl. ¶ 12, Exs. 4–5; Rioux Decl. ¶ 12, Ex. 9.)

As such, the Court finds that Gomez's claim for violation of the TCPA fails as a matter of law. Acting as a Navy contractor, C–E is immune from liability

under the doctrine of derivative sovereign immunity. The Court grants C–E's motion for summary judgment. Given the Court's ruling, the Court need not address C–E's remaining grounds for its motion.

V.

CONCLUSION

In light of the foregoing, C–E's motion for summary judgment is **GRANTED** and its motion for judgment on the pleadings is **DENIED**.

IT IS SO ORDERED.

JUDGMENT

Pursuant to the Court's February 22, 2013 Order re Defendant's Motion for Summary Judgment, IT IS HEREBY ORDERED, ADJUDGED, and DECREED that judgment is entered in favor of Defendant Campbell–Ewald Company and against Plaintiff Jose Gomez, who shall take nothing.

UNITED STATES DISTRICT COURT,
C.D. CALIFORNIA

Jose GOMEZ, individually and on behalf of a class of similarly situated individuals, Plaintiff,

v.

CAMPBELL–EWALD COMPANY, a Delaware corporation, Defendant.

Case No. CV 10–2007 DMG (CWx).

April 8, 2011.

805 F. Supp. 2d 923

ORDER RE: (1) PLAINTIFF'S MOTION TO STRIKE [Doc. # 32]; (2) PLAINTIFF'S MOTION FOR CLASS CERTIFICATION [Doc. # 33]; AND (3) DEFENDANT'S MOTION TO DISMISS [Doc. # 47]

DOLLY M. GEE, District Judge.

This matter is before the Court on the following: (1) Plaintiff's motion to strike [Doc. # 32]; (2) Plaintiff's motion for class certification [Doc. # 33]; and (3) Defendant's motion to dismiss [Doc. # 47]. The Court held a hearing on April 8, 2011. Having duly considered the respective positions of the parties, as presented in their briefs and at oral argument, the Court now renders its decision. For the reasons set forth below, Defendant's motion to dismiss is DENIED, Plaintiff's motion to strike is GRANTED, and the Court defers its ruling on Plaintiff's motion for class certification until after the parties have completed class discovery.

I.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Plaintiff's Claim*

On March 19, 2010, Plaintiff filed a class action complaint in this Court alleging violation of the Telephone Consumer Protection Act, 47 U.S.C. § 227 *et seq.* ("TCPA"). (Compl. ¶ 20.) According to Plaintiff, beginning in at least 2006, Defendant directed the mass transmission of wireless spam to the cellular telephones of consumers across the nation to advertise on behalf of the U.S. Navy. (Compl. ¶ 14.)

On or about May 11, 2006, Plaintiff received the following text message on his cellular phone:

> DESTINED FOR SOMETHING BIG? DO IT IN THE NAVY. GET A CAREER. AN EDUCATION. AND A CHANCE TO SERVE A GREATER CAUSE. FOR A FREE NAVY VIDEO CALL 1–800–510–2074.

(*Id.* ¶ 16; emphasis in original). Plaintiff received additional text message advertisements over the next several months and never consented to the receipt of such text message calls from Defendant. (*Id.* ¶¶ 18–19.)

Plaintiff seeks $500 in damages for each purported TCPA violation, as well as treble damages, injunctive relief, and an award of reasonable attorneys' fees and costs. (*Id.* ¶¶ 30-31.) Plaintiff seeks to certify a nationwide class of "thousands" consisting of "all persons in the United States and its Territories who received one or more unauthorized text message advertisements from Defendant." (*Id.* ¶¶ 20–21.)

B. *The Parties' Stipulation*

Pursuant to Local Rule 23–3, Plaintiff's motion for class certification was originally due to be filed on or before June 17, 2010.

On May 18–19, 2010, counsel for the parties conferred regarding Defendant's motion to dismiss. (Decl. of Michael J. McMorrow in Supp. Reply ("McMorrow MTD Decl.") ¶¶ 2–3.) In response to Plaintiff's counsel's request for additional time to respond to Defendant's motion, Defendant's counsel stated, "we are amenable to a change in the hearing date as long as you agree not to initiate discovery until after the motion is decided." (McMorrow MTD Decl. ¶ 3, Ex. 1.)

On June 2, 2010, the parties filed a stipulation (the "Stipulation") by which the parties agreed that the deadline for Plaintiff to file his motion for class certification should be extended. [Doc. # 9.] Plaintiff wished to wait for Defendant to answer or otherwise respond to the Complaint, and to conduct pre-certification discovery, before filing his motion for class certification. Defendant agreed that it would be "inefficient for the Court and the parties to expend resources on class certification-related activities before Defendant has responded to the Complaint and before any threshold motions are resolved and the pleadings are more settled." (Stipulation at 2.)

The parties therefore stipulated that:

> Following disposition of Defendant's responsive pleadings, the Parties, if necessary, anticipate presenting a proposed discovery schedule to the Court setting forth the deadlines and requirements associated with the parties' Rule 26(f) conference and report.

(*Id.*) On June 3, 2010, the Court approved the Stipulation and extended Plaintiff's deadline to file his motion for class certification "until after all Parties have answered and presented a proposed discovery schedule to the Court setting forth the deadlines and requirements associated with the parties' Rule 26(f) conference and report." [Doc. # 10.]

On May 19, 2010, Defendant filed its first motion to dismiss, which the Court denied on November 5, 2010. On November 19, 2010, Defendant filed its Answer. On November 22, 2010, Defendant filed a motion for reconsideration of its motion to dismiss, which the Court denied on December 9, 2010. On January 19, 2011, Plaintiff filed his motion for class certification. On February 1, 2011, the Court issued its Scheduling and Case Management Order.

C. *Defendant's Rule 68 Offer and Offer of Settlement*

On January 5, 2011, Defendant filed a notice of offer of judgment pursuant to Fed. R. Civ. P. 68 (the "Rule 68 Offer").[1] [Doc. # 31.] Defendant offered to allow judgment to be entered against it in this action (1) in the amount of $1503 for each unsolicited text message that Plaintiff alleged received from or on behalf of Defendant (which represented $501 trebled as requested by Plaintiff in the Complaint), (2) to pay any

---

[1] Rule 68 of the Federal Rules of Civil Procedure permits a defendant to "offer to allow judgment" at least 14 days before the date set for trial. Fed.R.Civ.P. 68(a). "If, within 14 days after being served, the opposing party serves written notice accepting the offer, either party may then file the offer and notice of acceptance, plus proof of service. The clerk must then enter judgment." *Id.* "An unaccepted offer is considered withdrawn." Fed.R.Civ.P. 68(b).

and all reasonable costs incurred by Plaintiff or his attorneys in the action, and (3) to allow the Court to enter an injunction against it. (Rule 68 Offer at 1.)

On January 5, 2011, Defendant also made a settlement offer to Plaintiff (the "Settlement Offer"). Defendant offered "to resolve all claims which [Plaintiff] has or had against [Defendant] arising from or related to any unsolicited text messages that were allegedly sent by or on behalf of [Defendant] to [Plaintiff] between March 19, 2006, and the present." (Decl. of Laura A. Wytsma ("Wytsma Decl.") ¶ 6, Ex. 5.) In the Settlement Offer, Defendant offered to: (1) pay Plaintiff the sum of $1503 for each and every unsolicited text message that was allegedly sent by or on behalf of Defendant to any cell phone owned by Plaintiff; (2) pay Plaintiff any costs that he would recover if he were to prevail in the action; and (3) agree to a stipulated injunction prohibiting it from the alleged "wireless spam activities." (*Id.*)

On January 19, 2010, Plaintiff filed a (1) motion to strike and quash Defendant's Rule 68 Offer [Doc. # 32] and a(2) motion for class certification [Doc. # 33]. On March 11, 2011, Defendant filed an opposition to Plaintiff's motion to strike, an opposition to Plaintiff's motion for class certification, and a second motion to dismiss [Doc. # 47]. On March 25, 2011, Plaintiff filed a reply in support of his motion to strike, a reply in support of his motion for class certification, and an opposition to Defendant's second motion to dismiss. On April 1, 2011, Defendant filed a reply in support of its second motion to dismiss.

II.

DEFENDANT'S MOTION TO DISMISS[2]

The parties do not dispute that Defendant's Rule 68 Offer would have fully satisfied the individual claims asserted, or that could have been asserted, by Plaintiff in this action.[3] The parties also do not dispute that an offer of judgment cannot moot a case once a class has been certified. The question before the Court is whether an offer of judgment made to a named plaintiff *prior* to class certification moots a putative class action.

Defendant contends that the Rule 68 Offer moots Plaintiff's claim because Plaintiff has "won" and there is no longer anything left for this Court to adjudicate. Plaintiff argues that the Rule 68 Offer is an improper attempt to "pick off" Plaintiff's claim because he had no opportunity to file a class certification motion prior to such offer.

---

[2] As Defendant has already filed an Answer, it cannot raise its mootness arguments by way of a motion under Fed.R.Civ.P. 12(b)(1). *See* Fed.R.Civ.P. 12(b). As Defendant has presented matters outside of the pleadings and Plaintiff has not objected, the Court construes Defendant's motion as one for summary judgment. *Id.* at 12(d).

[3] Rule 68 of the Federal Rules of Civil Procedure permits a defendant to "offer to allow judgment" at least 14 days before the date set for trial. Fed.R.Civ.P. 68(a). "If, within 14 days after being served, the opposing party serves written notice accepting the offer, either party may then file the offer and notice of acceptance, plus proof of service. The clerk must then enter judgment." *Id.* "An unaccepted offer is considered withdrawn." Fed.R.Civ.P. 68(b).

A. *Mootness Under Article III of the U.S. Constitution*

Article III of the Constitution limits federal subject matter jurisdiction to "cases and controversies." U.S. Const. art. III § 2; *United States Parole Commission v. Geraghty*, 445 U.S. 388, 395, 100 S.Ct. 1202, 63 L.Ed.2d 479 (1980); *see also Rosemere Neighborhood Ass'n v. U.S. Environmental Protection Agency*, 581 F.3d 1169, 1172-73 (9th Cir. 2009).

A case is moot when (1) "the issues presented are no longer live" or (2) the parties lack a "legally cognizable interest in the outcome." *Geraghty*, 445 U.S. at 396, 100 S.Ct. 1202 (internal quotations omitted). The "personal stake" requirement assures that the Court is presented with a dispute it is capable of resolving. *Id.* at 397, 100 S.Ct. 1202. "The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)." *Id.* (internal quotations omitted).

In the class action context, the Supreme Court has permitted named plaintiffs whose individual claims were mooted to appeal a denial of class certification. *Geraghty, supra*, 445 U.S. 388, 100 S.Ct. 1202; *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 100 S.Ct. 1166, 63 L.Ed.2d 427 (1980). Applying a "relation back" approach, the Supreme Court held that such named plaintiffs who had a personal stake at the inception of the action may continue to litigate the class certification issue on appeal in these circumstances: (1) where the claim is "capable of repetition yet evading review"; and (2) where the claim is so "inherently transitory" that the trial court will not have enough time to rule on a motion for class certification before

the proposed named plaintiff's individual interest expires. *Geraghty*, 445 U.S. at 398-99, 100 S.Ct. 1202.

B. *Whether A Rule 68 Offer of Judgment Moots Plaintiff's Class Claims*

The parties in this case debate whether the rationale animating the *Geraghty* and *Roper* decisions may be extended to a situation, as here, where an offer of judgment under Fed.R.Civ.P. 68 is conveyed *prior to* the filing of a class certification motion. Neither the Ninth Circuit nor the U.S. Supreme Court has squarely addressed whether an involuntary offer of judgment pursuant to Fed.R.Civ.P. 68 made prior to a class certification motion moots the named plaintiff's claims. *See Clausen Law Firm, PLLC v. Nat'l Academy of Continuing Legal Education*, ___ F.Supp.2d ___, 2010 WL 4396433 (W.D.Wash. Nov. 2, 2010).

Under the "relation back" doctrine, the Court considers a motion for class certification as "relating back" to the time the original class complaint was filed so that the named plaintiff retains standing to litigate the action even though his or her individual claims may otherwise have become moot. *See Sosna v. Iowa*, 419 U.S. 393, 402 n. 11, 95 S.Ct. 553, 42 L.Ed.2d 532 (1975); *see also Wade v. Kirkland*, 118 F.3d 667, 670 (9th Cir.1997).

The Court has surveyed the legal landscape with regard to the application of the relation back doctrine. Although there is no Ninth Circuit decision directly on point, the Ninth Circuit has provided hints in other analogous contexts as to how it might approach the issue. In *Smith v. T–Mobile USA, Inc.*, 570 F.3d 1119 (9th Cir.2009), the Ninth Circuit held that because the plaintiffs *voluntarily* settled all of their FLSA claims after the district court's denial of class certification, the plaintiffs failed to retain a personal stake in the

litigation and their claims were moot. *See Smith*, 570 F.3d at 1123. The court highlighted the term "voluntarily," in the following note:

> We use the term 'voluntarily' here to contrast a situation where a defendant purposefully makes an offer of judgment under Rule 68 of the Federal Rules of Civil Procedure and tenders the full amount of a named plaintiff's personal claims before the plaintiff can move for certification, as in *Sandoz v. Cingular Wireless, LLC*, 553 F.3d 913, 917–19 (5th Cir.2008).

Id. at 1121 n. 2. In *Narouz v. Charter Communications, LLC*, 591 F.3d 1261 (9th Cir. 2010), the Ninth Circuit went further to hold that even when a named plaintiff *voluntarily* settles his or her individual claims, but specifically retains a personal stake, the plaintiff may appeal the denial of class certification. *See Narouz*, 591 F.3d at 1264 (noting that in order to retain the requisite "personal stake," a class representative "cannot release any and all interests he or she may have had in class representation through a private settlement agreement").

The Third, Fifth, and Tenth Circuits have applied the Supreme Court's "relation back" approach to find that unaccepted offers of judgment will *not* moot a class action for monetary relief where such offer was received before the court could reasonably be expected to rule on the named plaintiff's class certification motion.[4] *See, e.g., Lucero v. Bureau of Collection*

---

[4] While the Seventh Circuit has recognized exceptions to the general rule that precludes a person from litigating a class action after his personal claim is extinguished, *i.e.*, the inherently transitory claim and the claim "capable of repetition ... but evading review," (*see, e.g., Wrightsell v. Cook County, Illinois*, 599

Recovery, Inc., 639 F.3d 1239, 1249 (10th Cir.2011) (finding a "nascent interest" attaches to the proposed class upon the filing of a class complaint such that a rejected offer made to a named plaintiff does not render the case moot under Article III); *Sandoz v. Cingular Wireless LLC*, 553 F.3d 913, 920 (5th Cir.2008) (applying relation back doctrine in the context of the section 216(b) of the Fair Labor Standards Act ("FLSA") when the FLSA plaintiff files a timely motion for certification of a collective action); *Weiss v. Regal Collections*, 385 F.3d 337, 347–48 (3d Cir.2004) (applying relation back doctrine in the context of the Fair Debt Collection Practices Act ("FDCPA") where defendant made a Rule 68 offer before the plaintiff had a reasonable opportunity to move for class certification).

In this case, Defendant argues that because Plaintiff "does not seek to *appeal* a denial of class certification but instead seeks to obtain a new ruling on the class certification issue," the "relation back" doctrine is inapplicable. (Def.'s Reply at 4.) Defendant argues that *Weiss* and *Sandoz* inappropriately extended the Supreme Court's decisions in *Roper* and *Geraghty* beyond the narrow procedural posture of those cases, *i.e.*, appeals of adverse class certification rulings in cases where one of the two exceptions—"capable of repetition" and "inherently transitory"—applies.

F.3d 781 (7th Cir.2010)), it has also held that the plaintiff cannot benefit from an exception to the mootness doctrine because the plaintiff did not move for class certification prior to the evaporation of his personal stake (*see Holstein v. City of Chicago*, 29 F.3d 1145, 1147 (7th Cir.1994)).

In support of its position, Defendant relies primarily on *Lusardi v. Xerox Corp.*, 975 F.2d 964 (3d Cir.1992), where the Third Circuit held that the named plaintiffs, who voluntarily settled their case after eight years, no longer retained the requisite personal stake under Article III to pursue class certification. Defendant's reliance on *Lusardi* is misplaced. In *Lusardi*, the named plaintiffs settled their individual claims before filing their motion to certify subclasses. Noting that there was a decision on the merits of class certification "not once but twice," the court determined that "this simply was not a case where the trial court lacked a reasonable opportunity to rule on the merits of class certification or where the class-action defendant successfully prevented effective resolution of a class certification issue." *Id.* at 983.

Indeed, in *Weiss*, a decision issued twelve years after *Lusardi*, the Third Circuit relied on *Roper* and *Geraghty* to find that the relation back doctrine *should* apply where the defendant made a Rule 68 offer before the court had "a reasonable opportunity" to consider class certification. *Weiss*, 385 F.3d at 346. Acknowledging that its decision created tension with its prior *Lusardi* decision, the court noted that the *Lusardi* plaintiffs *voluntarily* settled their claims before moving for class certification. *Id.* at 349. In contrast, because the *Weiss* defendant's "unilateral action" was used to "thwart" the putative class action before the certification question could be decided, the "'picking off scenarios described by the Supreme Court in *Roper* [were] directly implicated.'" *Id.* The court remanded the action to the district court to allow the plaintiff to file a motion for class certification.

The Sixth Circuit's decision in *Brunet v. City of Columbus*, 1 F.3d 390 (6th Cir.1993), is similarly

inapposite. There, because the plaintiffs accepted the defendant's settlement offer before the class certification motion was filed, the court found that the named plaintiffs did not have a "personal stake" at the time the district court certified the class. *Id.* at 400. The court noted that their claims were not mooted by the defendant's settlement offer or by the court's order, but rather, by their agreement to accept the defendant's offer. *Id.*

Defendant cites two District Court decisions, *Russell v. United States*, 2009 WL 4050938 (N.D.Cal. Nov. 20, 2009) and *Ptasinska v. U.S. Department of State*, 2008 WL 294907 (N.D.Ill. Jan. 31, 2008), which are equally unconvincing. The *Russell* court, in fact, distinguished its case from *Weiss* because "the United States did not seek to pick off a single plaintiff by offering an individual settlement to plaintiff." *Russell*, 2009 WL 4050938 at *5. Instead, the United States audited more than 170,000 accounts and issued refunds to approximately 59,000 customers, including the named plaintiff. The court therefore noted:

> Here, the United States, if it has picked off anything, has picked off an entire lawsuit and not just an individual plaintiff. The concerns of an involuntary settlement being used to thwart a class action are not present under these circumstances.

Id. While the *Ptasinska* court read *Roper* narrowly to find that the named plaintiff's claims were moot because her claims were resolved before she sought class certification, *Ptasinska* is an unpublished decision from a district court outside of this Circuit and not binding on this Court.

This Court rejects the notion that Defendant can make an end-run around a class action simply by virtue of a facile procedural "gotcha," *i.e.*, the conveyance of a

Rule 68 offer of judgment to "pick off" the named plaintiff prior to the filing of a class certification motion. The Court finds that the relation back doctrine is the proper approach in this context and next considers whether it should be applied under the particular facts of this case.

C. ***The "Relation Back" Doctrine Should be Applied in this Case***

1. **Plaintiff Was Not Dilatory In Filing His Motion for Class Certification**

In this case, Defendant asked Plaintiff to agree not to initiate discovery while its first motion to dismiss was pending (McMorrow Decl. ¶ 3, Ex. 1) and agreed that it would be "inefficient for the Court and the parties to expend resources on class certification-related activities before Defendant has responded to the Complaint and before any threshold motions are resolved and the pleadings are more settled" (Stipulation at 2). In the Stipulation, Plaintiff stated that he "wishe[d] to wait for Defendant Campbell-Ewald to answer or otherwise respond to the Complaint, and to conduct pre-certification discovery, before filing his motion for class certification." (Stipulation at 2.) As a result of the parties' agreement, the Court extended Plaintiff's deadline to file his motion for class certification "until after all Parties have answered and presented a proposed discovery schedule to the Court setting forth the deadlines and requirements associated with the parties' Rule 26(f) conference and report." [Doc. # 10.]

Plaintiff therefore maintains that he had no reasonable opportunity to move for class certification because (1) the Court denied Defendant's first motion to dismiss on November 5, 2010, (2) the Court denied Defendant's motion for reconsideration on December 9,

2010, (3) on December 17, 2010, the Court set a scheduling conference for February 7, 2010, and (4) Defendant made its Rule 68 Offer on January 5, 2011. Plaintiff contends that even if he had moved for class certification without discovery, he still would have had to comply with Local Rule 7–3's meet and confer requirement, which would have invited Defendant to immediately make a Rule 68 offer of judgment.

By the time Defendant filed its offer of judgment on January 5, 2011, just one month had passed since the time the Court denied Defendant's motion for reconsideration on their first motion to dismiss. Plaintiff filed his motion for class certification, albeit without the benefit of discovery, within two months after Defendant filed its Answer. Under these circumstances, the Court does not find that Plaintiff was dilatory in filing his motion for class certification.

2. Allowing Plaintiff's Class Claim to Proceed Furthers The Policies Underlying Fed.R.Civ.P. 23

Defendant contends that Congress did not intend for TCPA claims to be litigated as class actions in federal court.

According to the Ninth Circuit, "[w]here a statute is silent on the availability of class relief, the Supreme Court has instructed that we presume it to be available in all 'civil actions brought in federal court.'" *Bateman v. Am. Multi–Cinema, Inc.*, 623 F.3d 708, 717 (9th Cir.2010) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 699–700 99 S.Ct. 2545, 61 L.Ed.2d 176 (1979)). As TCPA is silent on the subject of class relief, this Court must presume its availability.

D. ***Defendant's Settlement Offer Does Not Moot Plaintiff's Claim***

Defendant contends that its separate offer of settlement also mooted Plaintiff's claims. In this case, Plaintiff has not accepted either the Rule 68 Offer or the Settlement Offer. In light of the Court's ruling that Defendant's unaccepted Rule 68 offer of judgment does not moot Plaintiff's putative class claim, the Court also finds that Defendant's unaccepted Settlement Offer does not moot Plaintiff's claim.

III.

PLAINTIFF'S MOTION TO STRIKE

Plaintiff contends Defendant's Rule 68 Offer should be quashed because it is an improper attempt to "pick off" Plaintiff's claim and that it should be quashed because Rule 68 does not allow a party to file a Rule 68 offer unless it has been accepted.

Defendant filed notice of its Rule 68 Offer on January 5, 2011. Rule 68 provides that "[i]f, within 14 days after being served, *the opposing party serves written notice accepting the offer*, either party may then file the offer and notice of acceptance, plus proof of service." Fed.R.Civ.P. 68 (emphasis added). Here, because Plaintiff did not accept Defendant's offer of judgment, Defendant was not entitled under Rule 68 to file the offer of judgment.

The Court therefore grants Plaintiff's motion strike Defendant's Rule 68 Offer.

IV.

PLAINTIFF'S MOTION FOR CLASS CERTIFICATION

Plaintiff seeks to certify a class pursuant to Fed.R.Civ.P. 23(b)(3) comprised of "all persons in the United States and its Territories who received one or

more unauthorized text message advertisements from Defendant." (Compl. ¶ 20.) Defendant objects to evidence presented by Plaintiff in support of his Motion for Class Certification.

Pursuant to the parties' Stipulation, on June 3, 2010, the Court extended the deadline for Plaintiff to file his Motion for Class Certification "until after all Parties have answered and presented a proposed discovery schedule to the Court setting forth the deadlines and requirements associated with the parties' Rule 26(f) conference and report." [Doc. # 10.] On January 5, 2011, Defendant served on Plaintiff the Rule 68 Offer. On January 19, 2010, Plaintiff hastily moved to strike the Rule 68 Offer and for class certification. On January 25, 2011, the parties filed their Joint Rule 26(f) report without proposing any schedule for class discovery. [Doc. # 36.] As a result of Defendant's Rule 68 Offer, Plaintiff was prompted to file his Motion for Class Certification *before* the parties filed their Joint Rule 26(f) report, contrary to the spirit of the parties' Stipulation in this case.

In light of the parties' Stipulation and the Court's ruling that this case is not moot, the Court defers its ruling on Plaintiff's Motion for Class Certification until after the parties have had an opportunity to engage in class discovery. Defendant's evidentiary objections are DENIED as moot.

V.
CONCLUSION

In light of the foregoing,

1. Defendant's Motion to Dismiss/Motion for Summary Judgment is DENIED.
2. Plaintiff's Motion to Strike and Quash is GRANTED; and

3. The Court defers its ruling on Plaintiff's Motion for Class Certification until after the parties have conducted class discovery:

   a. The parties shall meet and confer regarding a schedule for class discovery and shall file an Amended Joint Rule 26(f) Report regarding their proposed schedule by **April 22, 2011;**

   b. The parties shall meet and confer regarding a new schedule for supplemental briefing, if any, on Plaintiff's Motion for Class Certification and shall include their proposed schedule in their Amended Joint Rule 26(f) Report.

   c. The parties shall appear for a telephonic Status Conference on **May 2, 2011 at 11:00 a.m.**

IT IS SO ORDERED.

Michael L. Mallow (State Bar No. 188745)
mmallow@loeb.com
Laura A. Wytsma (State Bar No. 189527)
lwvtsma@loeb.com
Christine M. Reilly (State Bar No. 226388)
creilly@loeb.com
LOEB & LOEB LLP
10100 Santa Monica Boulevard, Suite 2200
Los Angeles, California 90067-4120
Telephone: (310) 282-2000
Facsimile: (310) 282-2200
Attorneys for Defendant
Campbell-Ewald Company

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JOSE GOMEZ, individually and on behalf of a class of similarly situated individuals, Plaintiff, v. CAMPBELL-EWALD COMPANY, a Delaware corporation, Defendant.	Case No. CV10-2007-DMG (CWx) Assigned to Hon. Dolly M. Gee OFFER OF JUDGMENT PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 68

1. Pursuant to Federal Rule of Civil Procedure 68, Defendant Campbell-Ewald Company ("C-E") hereby

offers to allow judgment to be entered against it in this action in the amount of $1503 for each unsolicited text message that plaintiff Jose Gomez ("Gomez") allegedly received from or on behalf of C-E. In addition, C-E agrees to pay Gomez for any costs which are recoverable in this action, as determined by the Court.

2. This offer of judgment includes $1503 per text message ($501 trebled) that Gomez has requested as damages for alleged violation of the Telephone Consumer Protection Act ("TCPA"). Gomez has alleged that he received one text message from or on behalf of C-E on May 11, 2006. C-E will pay Mr. Gomez $1503 for the alleged text message.

3. C-E will pay an additional $1503 per text message for any other unsolicited text messages that Mr. Gomez alleges were sent to him in the "several months" following May 11, 2006, as alleged in Paragraph 18 of his complaint, provided that Mr. Gomez and his counsel have a reasonable belief satisfying Federal Rule of Civil Procedure 11 that such messages were sent by or on behalf of C-E.

4. Campbell-Ewald further offers to pay for any and all reasonable costs allowable under law incurred by Gomez to his attorneys in this matter. Gomez must file a Notice of Application to the Clerk to Tax Costs pursuant to Local Rule 54-2 to recover such costs. Attorneys' fees are not recoverable under the TCPA.

5. Campbell-Ewald further offers to allow the Court to enter an injunction in the form proposed in Exhibit 1.

6. This offer is intended to fully satisfy the individual claims of Gomez asserted in this action or which could have been asserted in this action.

7. Pursuant to Federal Rule of Civil Procedure 68, this offer of judgment is made at least fourteen days before the date set for trial. This offer shall be deemed withdrawn unless written notice of acceptance is received within fourteen days of service.

8. This offer of judgment is made for purposes of Rule 68 only and shall not constitute or otherwise be construed as an admission of liability in any respect.

Dated: January 5, 2011

LOEB & LOEB LLP
MICHAEL L. MALLOW
LAURA A. WYTSMA
CHRISTINE M. REILLY

By */s/ Laura A. Wytsma*
Laura A. Wytsma
Attorneys for Defendant
CAMPBELL-EWALD
COMPANY

EXHIBIT 1

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JOSE GOMEZ, individually and on behalf of a class of similarly situated individuals, Plaintiff, v. CAMPBELL-EWALD COMPANY, a Delaware corporation, Defendant.	Case No. CV10-2007-DMG (CWx) Assigned to Hon. Dolly M. Gee [PROPOSED] STIPULATED PERMANENT INJUNCTION

1. The Court has jurisdiction over the subject matter of this action and over all parties to this action.

2. Plaintiff Jose Gomez ("Gomez") has filed a complaint under the Telephone Consumer Protection Act, 47 U.S.C. § 227 ("TCPA"), seeking damages and requesting injunctive relief. Gomez asserted a putative class action on behalf of himself and all others who received one or more unauthorized text message advertisements from defendant Campbell-Ewald Company ("C-E").

3. C-E has reached an individual settlement with Gomez, pursuant to which this case will be dismissed.

4. C-E consents to the entry of this Stipulated Permanent Injunction without admitting any liability or admitting any allegations in the complaint.

5. C-E consents to the entry of this Stipulated Permanent Injunction without admitting that grounds exist for the imposition of an injunction.

6. C-E consents to the entry of this Stipulated Permanent Injunction without further notice, and agrees that this Court shall retain jurisdiction over it for the purpose of implementing and enforcing this injunction.

NOW THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. C-E agrees to an injunction barring it from using automated telephone equipment to send text messages to mobile phones in violation of the TCPA.

2. C-E is not prohibited from sending text messages by any means, including automated telephone equipment, to any person who has given his or her consent to receive such messages or as otherwise permitted by the TCPA.

3. The Court shall retain jurisdiction over this action for purposes of implementing and enforcing this Stipulated Permanent injunction.

Dated: _____, 2011

_____

Honorable Dolly M. Gee
United States District Judge

LOEB & LOEB LLP

Laura A. Wytsma
Partner
10100 Santa Monica Blvd.
Suite 2200
Los Angeles, CA 90067

Direct 310.282.2251
Main 310.282.2000
Fax 213.947.4561
lwytsma@loeb.com

Via Email and Federal Express

January 5, 2011

Michael J. McMorrow
Edelson McGuire, LLP
350 North La Salle, 13th Floor
Chicago, Illinois 60654
mmorrow@edelson.com

Sean Reis
Edelson McGuire LLP
30021 Tomas Street, Suite 300
Rancho Santa Margarita, California 92688
sreis@edelson.com

Re: *Jose Gomez v. Campbell-Ewald Company*
Case No. CV-10-02007 DMG (CWx)

Dear Gentlemen:

As you know, we represent Campbell-Ewald Company ("C-E") in the above-referenced lawsuit filed under the Telephone Consumer Protection Act ("TCPA").

C-E makes the following settlement offer to plaintiff Jose Gomez to resolve all claims which he has or had against C-E arising from or related to any unsolicited text messages that were allegedly sent by or on behalf of C-E to Mr. Gomez between March 19, 2006, and the

present. In extending this settlement offer, C-E does not admit any liability.

C-E hereby offers to pay Mr. Gomez the sum of $1503 for each and every unsolicited text message that was allegedly sent by or on behalf of C-E to any cell phone owned by Mr. Gomez or for which Mr. Gomez was the subscriber or the person responsible for payment. The complaint identifies only a single text message on May 11, 2006, and we are not aware of any other text messages sent to Mr. Gomez by or on behalf of C-E. Please identify any additional unsolicited text messages that Mr. Gomez alleges that he received on his cell phone in the "several months" following May 11, 2006, so that I may arrange for payment. In identifying these additional text messages, we trust that your firm will exercise good faith consistent with the obligations of Federal Rule of Civil Procedure 11 in determining whether it can reasonably be alleged that the additional text messages were sent by or on behalf of C-E (as opposed to merely from the unidentified SMS number referenced in the Complaint).

C-E also agrees to pay Mr. Gomez any costs which he would recover were he to prevail in his suit, including filing fee and any service fees which would be taxable as costs. This offer does not include attorneys' fees, which are not recoverable under the TCPA. Please provide me in writing with an itemized statement of recoverable costs so that I may arrange for payment of these as well.

C-E further agrees as part of its settlement offer to the entry of a stipulated injunction as sought in Mr. Gomez's complaint. Specifically, C-E will stipulate to an injunction prohibiting it from the alleged "wireless

spam activities," *viz.*, sending unsolicited commercial text messages to cellular telephones unless the subscriber has consented to receive such text messages or the TCPA permits such text messages to be sent. A proposed injunction is enclosed for your consideration.

The offers extended in this letter are intended to fully satisfy the individual claims of Mr. Gomez or which could have been made in his suit.

Please advise whether Mr. Gomez will accept C-E's offer so that I may arrange for prompt payment.

Sincerely,

/s/ Laura A. Wytsma
Laura A. Wytsma

Enclosure
cc: Michael L. Mallow
Christine M. Reilly

[Offer Letter enclosure]

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JOSE GOMEZ, individually and on behalf of a class of similarly situated individuals, Plaintiff, v. CAMPBELL-EWALD COMPANY, a Delaware corporation, Defendant.	Case No. CV10-2007-DMG (CWx) Assigned to Hon. Dolly M. Gee [PROPOSED] STIPULATED PERMANENT INJUNCTION

1. The Court has jurisdiction over the subject matter of this action and over all parties to this action.

2. Plaintiff Jose Gomez ("Gomez") has filed a complaint under the Telephone Consumer Protection Act, 47 U.S.C. § 227 ("TCPA"), seeking damages and requesting injunctive relief. Gomez asserted a putative class action on behalf of himself and all others who received one or more unauthorized text message advertisements from defendant Campbell-Ewald Company ("C-E").

3. C-E has reached an individual settlement with Gomez, pursuant to which this case will be dismissed.

4. C-E consents to the entry of this Stipulated Permanent Injunction without admitting any liability or admitting any allegations in the complaint.

5. C-E consents to the entry of this Stipulated Permanent Injunction without admitting that grounds exist for the imposition of an injunction.

6. C-E consents to the entry of this Stipulated Permanent Injunction without further notice, and agrees that this Court shall retain jurisdiction over it for the purpose of implementing and enforcing this injunction.

NOW THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. C-E agrees to an injunction barring it from using automated telephone equipment to send text messages to mobile phones in violation of the TCPA.

2. C-E is not prohibited from sending text messages by any means, including automated telephone equipment, to any person who has given his or her consent to receive such messages or as otherwise permitted by the TCPA.

3. The Court shall retain jurisdiction over this action for purposes of implementing and enforcing this Stipulated Permanent injunction.

Dated: _____, 2011

_____

Honorable Dolly M. Gee
United States District Judge

FILED
OCT 24 2014
MOLLY C. DWYER,
CLERK
U.S. COURT OF
APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOSE GOMEZ, individually and on behalf of a class of similarly situated individuals, Plaintiff - Appellant, v. CAMPBELL-EWALD COMPANY, Defendant - Appellee.	No. 13-55486 D.C. No. 2:10-cv-02007-DMG-CW Central District of California, Los Angeles ORDER

Before: BENAVIDES,* WARDLAW, and CLIFTON, Circuit Judges.

Appellee's motion for a stay of the issuance of the mandate pending a petition for writ of certiorari is GRANTED. Fed. R. App. P. 41(b).

The mandate shall be stayed for 90 days from the filing date of this order pending the filing of a petition for writ of certiorari in the Supreme Court. If a

---

* The Honorable Fortunato P. Benavides, Senior Circuit Judge for the U.S. Court of Appeals for the Fifth Circuit, sitting by designation.

petition for writ of certiorari is filed, the stay shall continue until final disposition by the Supreme Court.

IT IS SO ORDERED.

United States Constitution art. III, § 2

Section. 2. The judicial power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.[1]

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

---

[1] This section has been affected by the Eleventh Amendment.

47 U.S.C. § 227

§ 227. Restrictions on use of telephone equipment

* * *

(b) Restrictions on use of automated telephone equipment

(1) Prohibitions

It shall be unlawful for any person within the United States, or any person outside the United States if the recipient is within the United States—

(A) to make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice—

(i) to any emergency telephone line (including any "911" line and any emergency line of a hospital, medical physician or service office, health care facility, poison control center, or fire protection or law enforcement agency);

(ii) to the telephone line of any guest room or patient room of a hospital, health care facility, elderly home, or similar establishment; or

(iii) to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call;

(B) to initiate any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party, unless the call is initiated for emergency purposes

or is exempted by rule or order by the Commission under paragraph (2)(B);

(C) to use any telephone facsimile machine, computer, or other device to send, to a telephone facsimile machine, an unsolicited advertisement, unless—

(i) the unsolicited advertisement is from a sender with an established business relationship with the recipient;

(ii) the sender obtained the number of the telephone facsimile machine through—

(I) the voluntary communication of such number, within the context of such established business relationship, from the recipient of the unsolicited advertisement, or

(II) a directory, advertisement, or site on the Internet to which the recipient voluntarily agreed to make available its facsimile number for public distribution,

except that this clause shall not apply in the case of an unsolicited advertisement that is sent based on an established business relationship with the recipient that was in existence before July 9, 2005, if the sender possessed the facsimile machine number of the recipient before July 9, 2005; and

(iii) the unsolicited advertisement contains a notice meeting the requirements under paragraph (2)(D),

except that the exception under clauses (i) and (ii) shall not apply with respect to an unsolicited advertisement sent to a telephone facsimile machine by a sender to whom a request has

been made not to send future unsolicited advertisements to such telephone facsimile machine that complies with the requirements under paragraph (2)(E); or

(D) to use an automatic telephone dialing system in such a way that two or more telephone lines of a multi-line business are engaged simultaneously.

* * *

(3) Private right of action

A person or entity may, if otherwise permitted by the laws or rules of court of a State, bring in an appropriate court of that State—

(A) an action based on a violation of this subsection or the regulations prescribed under this subsection to enjoin such violation,

(B) an action to recover for actual monetary loss from such a violation, or to receive $ 500 in damages for each such violation, whichever is greater, or

(C) both such actions.

If the court finds that the defendant willfully or knowingly violated this subsection or the regulations prescribed under this subsection, the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount available under subparagraph (B) of this paragraph.

* * *

Federal Rule of Civil Procedure 68(a)

Rule 68. Order of Judgment.

(a) **Making an Offer; Judgment on an Accepted Offer.** At least 14 days before the date set for trial, a party defending against a claim may serve on an opposing party an offer to allow judgment on specified terms, with the costs then accrued. If, within 14 days after being served, the opposing party serves written notice accepting the offer, either party may then file the offer and notice of acceptance, plus proof of service. The clerk must then enter judgment.

* * *